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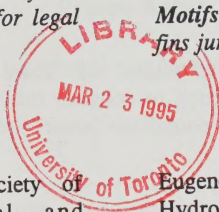
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Information

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Summary

Résumé

Eugene Kalwa, *complainant*, Society of Ontario Hydro Professional and Administrative Employees, *respondent*, and Ontario Hydro, *employer*.

Eugene Kalwa, *plaignant*, Society of Ontario Hydro Professional and Administrative Employees, *intimée*, et Ontario Hydro, *employeur*.

Board Files: 745-4754; 745-4976
CLRB/CCRT Decision no. 1106
February 17, 1995

Dossiers du Conseil: 745-4754; 745-4976
CLRB/CCRT Décision n° 1106
le 17 février 1995

This case deals with two complaints alleging violation of section 37 of the Canada Labour Code (Part I - Industrial Relations).

La présente affaire porte sur deux plaintes alléguant violation de l'article 37 du Code canadien du travail (Partie I - Relations du travail).

A preliminary objection was raised as to the Board's jurisdiction to hear the complaints based on the condition set out in section 37 that the duty of fair representation arises with respect to rights under the collective agreement that is applicable to employees in the unit. In this case, as there is no collective agreement applicable to the complainant, there is no duty of fair representation enforceable under the Code.

Une objection préliminaire a été soulevée à savoir si le Conseil a compétence pour entendre les plaintes en se fondant sur la condition stipulée à l'article 37 selon laquelle le devoir de représentation juste s'applique aux droits reconnus par la convention collective aux employés de l'unité. En l'espèce, étant donné qu'aucune convention collective ne s'applique au plaignant, il n'y a pas de devoir de représentation juste applicable en vertu du Code.

Although the Society and the employer relied on a document in effect governing a form of collective bargaining relationship, that document does not constitute a collective agreement, as it was so found in Ontario Hydro (1994), as yet unreported CLRB decision no. 1065. The Board finds that, although it did certify the Society as bargaining agent for the unit sought in that decision, the Society and the employer had not entered into a collective agreement in respect of the unit to which the complainant

Bien que l'intimée et l'employeur aient invoqué un document régissant une sorte de relation de négociation collective, ce document ne constitue pas une convention collective, comme il a été décidé dans Ontario Hydro (1994), décision du CCRT n° 1065, non encore rapportée. Le Conseil juge que, même s'il a accrédité l'intimée à titre d'agent négociateur de l'unité visée dans cette décision, l'intimée et l'employeur n'ont pas conclu de convention collective à l'égard de l'unité à laquelle appartient le plaignant. Par

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Board
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belongs. Accordingly, the Board does not have jurisdiction to consider the allegations made. The complaints must therefore be dismissed.

However, in fairness to all parties, and in view of the representations submitted, the Board considered the substance of the material on file. On that basis, the Board determined that the Society would not have been in breach of section 37, had that section been found to be applicable.

conséquent, le Conseil n'a pas compétence pour examiner les allégations formulées. Les plaintes doivent donc être rejetées.

Cependant, pour être juste envers toutes les parties, et compte tenu des observations formulées, le Conseil a examiné les documents au dossier. D'après ces renseignements, le Conseil a constaté que l'intimée n'aurait pas été coupable de violation de l'article 37, s'il avait été jugé que cet article était applicable.

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Travail

Reasons for decision

Eugene Kalwa,

applicant/complainant,

and

Society of Ontario Hydro Professional and
Administrative Employees,

respondent,

and

Ontario Hydro,

employer.

Board File: 745-4754/4976
CLRB/CCRT Decision no. 1106
February 17, 1995

The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Messrs. Calvin B. Davis and Michael Eayrs, Members. A hearing was held on February 6, 1995, at Toronto.

Appearances

Dr. Eugene Kalwa, on his own behalf;

Mr. David W.T. Matheson accompanied by Mr. Blaine Donais, for the Society; and
Mr. David Akande, accompanied by Ms. Mary Jan Lyle, Human Resources,
Consultant/Employment Equity Advisor, for Ontario Hydro.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

The applications now before the Board are complaints that the respondent Society has breached the duty of fair representation established under section 37 of the Canada Labour Code.

I

At the hearing of this matter, and further to the notice of hearing, preliminary objections were raised going to the jurisdiction of this Board to hear these complaints. One objection went to the jurisdiction of the Board to hear these matters at all, that objection being based on the condition set out in section 37 of the Code that the duty of fair representation arises " - - with respect to - - rights under the collective agreement that is applicable [to employees in the bargaining unit]". The other objections related to matters of timeliness affecting some at least of these applications. In these reasons, we have found it necessary to deal only with the first of these objections.

II

Jurisdiction to hear complaints of violation of section 37 is conferred by section 97(1)(a) of the Code. Section 37 itself, which creates the duty of fair representation, is as follows:

"A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the bargaining unit with respect to their rights under the collective agreement that is applicable to them."

The objection is that there is said to be no collective agreement applicable to the complainant, and thus no duty of fair representation enforceable under the Code. The facts in this regard are partly set out in an earlier decision of this Board, supplemented by statements of counsel not contested by any party. Those facts are as follows. There has been in effect for some time a document which has been relied on by the respondent Society and the employer as governing a form of collective bargaining relationship. That document, as the Board found in Ontario Hydro (1994), as yet unreported CLRB decision no. 1065, on an application for certification by the Society, had been entered into on the express assumption that the labour relations between the employer and the Society in respect of the unit of employees for which certification was sought were governed by the Ontario Labour Relations Act. The parties were

aware that that assumption might prove incorrect, and a decision of the Supreme Court of Canada has made it clear that it was in fact incorrect. The parties had turned their minds to that possibility and had provided in the document itself that if labour relations between the parties affecting the union in question were found to come within federal jurisdiction - and it was indeed found that they did - then there was no voluntary recognition of the union as a bargaining agent, and the document did not constitute a collective agreement. In Ontario Hydro (1994), as yet unreported CLRB decision no. 1065 the Board, confirming a ruling made at the hearing, concluded that:

"In our view, however, it cannot now be said that there is in effect a collective agreement between the applicant and the respondent covering employees coming within federal jurisdiction, that is, whose labour relations are governed by the Canada Labour Code. That is because there was, very explicitly, no voluntary recognition of the applicant as bargaining agent for such persons, and the agreement which was made very explicitly did not apply to them.

The parties, it is clear, sought to leave themselves unfettered in respect of the application of the Code. That collective agreement would not have acted as a bar to any application by any trade union in respect of federal employees."

For the Board to have concluded otherwise would, we think, have been contrary to the Code, and would as well have had adverse consequences on the rights of other potential bargaining agents to seek to represent employees in the bargaining unit.

Since that time it appears that there have been, as the Code contemplates there should be, negotiations between the trade union and the employer, and we are advised that a tentative settlement has been reached, and that a ratification process is now underway. If the negotiated settlement is ratified, then a collective agreement will be entered into.

By section 3(1) of the Canada Labour Code,

"collective agreement" means an agreement in writing entered into between an employer and a bargaining agent containing provisions

respecting terms and conditions of employment and related matters;" and

"bargaining agent" means

(a) a trade union that has been certified by the Board as the bargaining agent for the employees in a bargaining unit and the certification of which has not been revoked, or

(b) any other trade union that has entered into a collective agreement on behalf of the employees in a bargaining unit

(i) the term of which has not expired, or

(ii) in respect of which the trade union has, by notice given pursuant to section 49(1), required the employer to commence collective bargaining;"

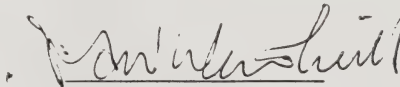
The Society was certified as bargaining agent by this Board on May 27, 1994, as a result of the application referred to above. In the circumstances described in this case, it was only then that the Society's entitlement to negotiate and enter into a collective agreement arose. A collective agreement has not yet been made. For us now to conclude that the document which has, in fact, guided the relations between the parties constitutes a collective agreement would not only be contrary to the Board's finding in the certification case, but would necessarily imply that the negotiations which have taken place, and the ratification process now underway, are without effect. To find that there is now a collective agreement in effect would be contrary to the Code, and would quite undermine serious collective bargaining.

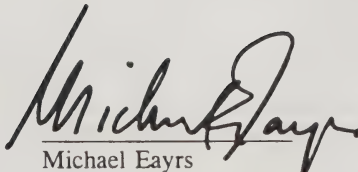
In our view, at the time these applications were made, and at the present time, there is no collective agreement in effect between the Society and the employer in respect of the unit of employees of which the complainant is a member, and we so find. To use the language of section 37 of the Code, there is no "collective agreement applicable" to the complainant, and accordingly, there is no jurisdictional basis for the Board to consider the allegations made in the complaints.

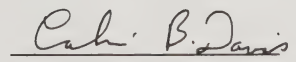
III

For the foregoing reasons, these applications must be dismissed.

All parties, however, agree that a document having many of the features of a collective agreement is in fact relied on for everyday purposes. While, for the reasons we have given, it cannot be said that a collective agreement is in existence, the respondent Society acknowledges that it has an obligation to represent members of the bargaining unit fairly and without discrimination, whether or not section 37 of the Code may be relied on by employees in these particular circumstances. In fairness to all parties, and in view of the representations which have been made, the Board has considered the substance of the material on file and states its view, having regard to the criteria established by this Board in a considerable number of cases, that the respondent trade union has in fact given consideration to the grievances of the applicant, that it is proceeding to arbitration with respect to certain of these grievances, and that the material before us would not lead us to conclude that the trade union was in breach of section 37 of the Code in respect of the applicant, were section 37 found to apply.


J.F.W. Weatherill
Chairman


Michael Eayrs
Member


Calvin.B. Davis
Member

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Summary

Yukon Hospital Corporation, *applicant/ employer*, Public Service Alliance of Canada, *applicant/bargaining agent*, and Professional Institute of the Public Service of Canada, *intervenor/bargaining agent*.

Board Files: 555-3671
555-3672
590-29
590-30
590-31

CLRB/CCRT Decision no. 1107
February 21, 1995

As a result of the transfer of the Whitehorse General Hospital and its staff from Health and Welfare Canada to the Yukon Hospital Corporation (YHC), the applicant filed an application pursuant to section 47(3) of the Canada Labour Code (Part I - Industrial Relations) requesting the Board to determine pursuant to section 47(4) that one bargaining unit represented by a bargaining agent is appropriate for collective bargaining.

Subsequently, the Public Service Alliance of Canada (PSAC) filed four separate applications, two pursuant to section 47(3) as well as two certification applications pursuant to section 24 of the Code. PSAC requests that the Board determine that two different bargaining units are appropriate for collective bargaining and certify it to represent the

Résumé

Yukon Hospital Corporation, *employeur requérant*, Alliance de la Fonction publique du Canada, *agent négociateur requérant*, et Institut professionnel de la Fonction publique du Canada, *agent négociateur intervenant*.

Dossiers du Conseil: 555-3671
555-3672
590-29
590-30
590-31

CLRB/CCRT Décision n° 1107
le 21 février 1995

À la suite du transfert de l'hôpital général de Whitehorse ainsi que de son personnel de Santé et Bien-être Canada à la Yukon Hospital Corporation (YHC), cette dernière a présenté une demande en vertu du paragraphe 47(3) du Code canadien du travail (Partie I - Relations du travail). Elle demande au Conseil de déterminer aux termes du paragraphe 47(4) qu'une unité de négociation représentée par un agent négociateur est habile à négocier collectivement.

Par la suite, l'Alliance de la Fonction publique du Canada (AFPC) a présenté quatre demandes distinctes, soit deux demandes en vertu du paragraphe 47(3) et deux demandes d'accréditation fondées sur l'article 24 du Code. L'AFPC demande au Conseil de juger que deux unités distinctes sont habiles à négocier collectivement et de l'accréditer à



employees in each of the said units. The employees in one of these units are currently represented by the Professional Institute of the Public Service of Canada (PIPS).

PIPS objects to the applications for certification filed by PSAC (whether under sections 24(1) and 47(2) of the Code) on the grounds that they were not filed during a period in which an application is authorized under section 24. PIPS claims a collective agreement bar.

The Board dismisses the three section 47 applications deciding that section 47 is only applicable to Crown corporations as defined in section 5(1) of the Code and finding that YHC is not such a corporation.

The Board rejects PIPS' argument that the applications for certification are untimely. It finds that no collective agreement is or could be applicable to the units that, according to the applicant union, are appropriate for collective bargaining and which the Board would determine to be so appropriate.

The Board issues a certification order with respect to one of the applications for certification (non-professional employees). Furthermore, it orders a vote with respect to the second application (professional employees) to determine whether these employees wish to be represented by PIPS or by PSAC.

l'égard des employés de chacune de ces unités. Les membres de l'une de ces unités sont à l'heure actuelle représentés par l'Institut professionnel de la Fonction publique du Canada (IPFP).

L'IPFP s'oppose aux demandes d'accréditation présentées par l'AFPC (tant en vertu du paragraphe 24(1) que du paragraphe 47(2) du Code) pour le motif qu'elles n'ont pas été présentées à un moment où une demande est autorisée en vertu de l'article 24. Elle prétend que la convention collective constitue un empêchement.

Le Conseil rejette les trois demandes présentées en vertu de l'article 47 estimant que cet article ne s'applique qu'aux sociétés d'État selon la définition figurant au paragraphe 5(1) du Code et jugeant que YHC n'est pas une société d'État.

Le Conseil rejette l'argument de l'IPFP selon lequel les demandes d'accréditation n'ont pas été présentées dans les délais prescrits. Il juge qu'aucune convention collective ne s'applique ou pourrait s'appliquer aux unités qui, selon le syndicat requérant, sont habiles à négocier collectivement et que le Conseil pourrait juger telles.

Le Conseil rend une ordonnance d'accréditation à l'égard d'une des demandes d'accréditation (les employés non professionnels). En outre, il ordonne la tenue d'un scrutin à l'égard de la deuxième demande (les membres de professions libérales) afin de déterminer si ces personnes souhaitent être représentées par l'IPFP ou l'AFPC.

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Reasons for decision

Yukon Hospital Corporation,

applicant/employer,

Public Service Alliance of Canada,

applicant/bargaining agent,

and

Professional Institute of the Public
Service of Canada,

intervenor/bargaining agent.

Board Files: 555-3671
555-3672
590-29
590-30
590-31

CLRB/CCRT Decision no. 1107

February 21, 1995

The Board consisted of Mr. J. Philippe Morneau, Vice-Chair and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances: (on record)

Mr. Peter R. Sheen, Counsel for the applicant employer;

Mr. Andrew J. Raven, Counsel for the applicant and bargaining agent Public Service Alliance of Canada;

Mr. Denis A. Hotte, Manager, Regional/Educational Services, Professional Institute of the Public Service of Canada.

These reasons for decision were written by Mr. J. Philippe Morneau, Vice-Chair.

The Board is here dealing with five applications which have been made to the Canada Labour Relations Board concerning the transfer of the Whitehorse General Hospital and its staff from Health and Welfare Canada to the Yukon Hospital Corporation. The first application, file 590-29, is an application filed with the Board by the Yukon Hospital Corporation (herein the employer) pursuant to section 47 of the Canada Labour Code (Part I - Industrial Relations) on October 28, 1993. The employer seeks determinations pursuant to section 47(4) of the Code that one bargaining unit, represented by one trade union, is appropriate for collective bargaining, and that terms and conditions of employment for the employees be continued in one collective agreement.

Subsequent to that application, the Public Service Alliance of Canada (herein PSAC) filed the four following applications: file 590-30 is an application filed with the Canada Labour Relations Board by PSAC pursuant to section 47 of the Canada Labour Code, supra, on October 29, 1993. PSAC seeks determinations pursuant to section 47(4) of the Code that a bargaining unit comprised of non-professional employees continues to be appropriate for collective bargaining, that that bargaining unit should continue to be represented by PSAC, and that the existing collective agreement applicable to non-professional employees remains in force. File 555-3671 is an application for certification filed by PSAC pursuant to section 24 of the Canada Labour Code, supra, on October 29, 1993. PSAC seeks certification for a bargaining unit comprised of non-professional employees it presently represents pursuant to an order of the Public Service Staff Relations Board. This application for certification is a companion of, and is in the alternative to, the PSAC's application in file 590-30. File 590-31 is an application filed with the CLRB by PSAC pursuant to section 47 of the Canada Labour Code, supra, on October 29, 1993. PSAC seeks to represent a bargaining unit comprised of professional employees who are presently represented by the Professional Institute of the Public Service of Canada (hereinafter PIPS). File

555-3672 is an application for certification filed by PSAC pursuant to section 24 of the Canada Labour Code, supra, on October 29, 1993. PSAC seeks certification for a bargaining unit comprised of professional employees who are presently represented by PIPS pursuant to an order of the Public Service Staff Relations Board. This application is a companion of, and is in the alternative to, the PSAC's application in file 590-31.

The Board decided that it would not be necessary to hold a public hearing in these matters and determined them on the basis of the contents of the files, the Investigating Officer's Report which was submitted to all the parties, as well as the full and able submissions of the parties herein.

II

The material facts concerning these applications are summarized below.

The Whitehorse General Hospital was for many years operated by the Medical Services Branch of the Department of National Health and Welfare. The hospital serves not only the City of Whitehorse but also outlying communities in the Yukon. It is the only facility of its size and kind in the Yukon.

Employees of the Whitehorse General Hospital were federal public servants. Most employees were represented by PSAC, and were included in one or other of the occupational family type bargaining units for which PSAC had been certified by the Public Service Staff Relations Board.

The professional employees, more particularly the registered nurses, dietitians, pharmacists and occupational and physical therapists, were represented by the PIPS, and were included in separate bargaining unit groups for which PIPS had been certified by the Public Service Staff Relations Board.

In 1989, the first steps were taken to "privatize" the Whitehorse General Hospital. The Commissioner of the Yukon Territory, with the advice and consent of the Territorial Legislative Assembly, enacted the Yukon Hospital Act, SY 1989, c. 13. The Act was assented to on December 7, 1989. That Act established the Yukon Hospital Corporation to provide hospital and medical services to meet the needs of people in the Yukon. The Corporation's relationship to the Government of the Yukon is set out in section 8 of that Act.

On January 21, 1991, in anticipation of the transfer of the Whitehorse General Hospital to the Yukon Hospital Corporation, a Memorandum of Understanding was entered into by the Government of Yukon, PSAC and PIPS. The Memorandum of Understanding sets out terms and conditions of employment agreed to by the parties for those employees at the Whitehorse General Hospital who would accept employment with the Yukon Hospital Corporation following the transfer of the hospital.

On April 1, 1993, the Government of Canada, the Government of Yukon and the Yukon Hospital Corporation entered into a comprehensive agreement respecting the transfer of National Health and Welfare programs, services and facilities to the Government of Yukon, including the Whitehorse General Hospital. This agreement is known as the Whitehorse General Hospital Transfer Agreement. In the result, the Yukon Hospital Corporation assumed responsibility for the operation of the Whitehorse General Hospital. Also on April 1, 1993, the Government of Canada, the Government of Yukon and the Yukon Hospital Corporation entered into another agreement known as the Whitehorse General Hospital Bridging Agreement. The Bridging Agreement provided for the orderly transfer of the hospital's staff from the Public Service of Canada to the Yukon Hospital Corporation. The staff were to remain federal public servants until the termination date of the Bridging Agreement which was October 1, 1993, whereupon they became employees of the Yukon Hospital Corporation. The October 1, 1993 date sets the stage for the filing of the

above applications inasmuch as section 47(3) of the Code provides a thirty-day time limit for the employer or any bargaining agent to make application pursuant to section 47.

Prior to October 1, 1993, during the time that the Whitehorse General Hospital was operated by Health and Welfare Canada, its industrial relations activities were conducted in accordance with the Public Service Staff Relations Act. PSAC represented employees in the following occupational groups/bargaining units: Administrative and Foreign Service Category, PG Purchasing and Supply, WP Welfare Programmes, AS Administrative Services, PM Programme Administration; Technical Category, EG Engineering and Scientific Support; Administrative and Support Category, CR Clerical and Regulatory, ST-SCY, Secretarial; Operational Category, GL General Labour and Trades, GS General Services, HP Heating and Power, HS Hospital Services. PIPS for its part represented employees in the following occupational groups/bargaining units: Scientific and Professional Category, HE Home Economics, NU Nursing, OP Occupational and Physical Therapy, PH Pharmacy. Reference to these bargaining units groups is incorporated into the Memorandum of Understanding which was entered into by the Government of Yukon, PSAC and PIPS.

As it stood prior to the actual transfer date of October 1, 1993, PSAC and the Treasury Board of Canada Secretariat were party to a master collective agreement covering non-professional employees affected by these applications. The duration of the collective agreement was from May 17, 1989 to various dates in 1991 (for certain groups of employees), as specified in Article M-43 of the agreement. The durations of the collective agreement were extended for a period of two years by the Public Sector Compensation Act (S.C. 1991 c. 30) and, for a further 48 months by the terms of Bill C-17, the Budget Implementation Act, 1994. PIPS and the Treasury Board of Canada are party to a master collective agreement covering the professional employees affected by these applications. The employees covered by the agreement are those in

nursing, occupational and physical therapy, pharmacy and home economics (includes dietitians) groups. The duration of the agreement was from September 24, 1991 to September 30, 1993. PIPS gave notices pursuant to Articles 48.03 and 48.04 of that agreement extending the said agreement to the following dates: Nursing - January 2, 1994; Occupational and Physical Therapy - May 1, 1994; Pharmacy - April 5, 1994. The home economics group is not mentioned in Article 48.04. The provisions of the Public Sector Compensation Act of 1991 and the Budget Implementation Act of 1994, supra, would also apply to this collective agreement. All these applications were duly posted in accordance with the Board's regulations and, as a result, five employees who work in the Diagnostic Imaging Department have filed written submissions with the Board wherein they say that, as certified medical radiation technologists, their health care objectives and concerns and their community of interest lie with those persons who are included in the proposed professional bargaining unit and that they should be included in any professional unit found appropriate by the Board. Also five employees who work in the medical laboratory also filed written submissions with the Board wherein they feel that they have a community of interest with, and would be better represented if they were included in a bargaining unit with other health care professionals, such as nurses and pharmacists. It must be noted that in both PSAC and PIPS submissions, these positions would be in the "non-professional" unit.

III

The Canada Labour Code provisions which are applicable to and brought in question by these applications are as follows:

"2. In this Act,

'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces;

...

4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

5.(1) This Part applies in respect of any corporation established to perform any function or duty on behalf of the Government of Canada and in respect of the employees of any such corporation, except any such corporation, and the employees thereof, that the Governor in Council excludes from the operation of this Part.

6. Except as provided by section 5, this Part does not apply in respect of employment by Her Majesty in right of Canada.

24.(1) A trade union seeking to be certified as the bargaining agent for a unit that the trade union considers constitutes a unit appropriate for collective bargaining may, subject to this section and any regulations made by the Board under paragraph 15(e), apply to the Board for certification as the bargaining agent for the unit.

(2) Subject to subsection (3), an application by a trade union for certification as the bargaining agent for a unit may be made

(a) where no collective agreement applicable to the unit is in force and no trade union has been certified under this Part as the bargaining agent for the unit, at any time;

(b) where no collective agreement applicable to the unit is in force but a trade union has been certified under this Part as the bargaining agent for the unit, after the expiration of twelve months from the date of that certification or, with the consent of the Board, at any earlier time;

(c) where a collective agreement applicable to the unit is in force and is for a term of not more than three years, only after the commencement of the last three months of its operation; and

(d) where a collective agreement applicable to the unit is in force and is for a term of more than three years, only after the commencement of the thirty-fourth month of its operation and before the commencement of the thirty-seventh month of its operation and, thereafter, only

(i) during the three month period immediately preceding the end of each year that the collective agreement continues to operate after the third year of its operation, and

(ii) after the commencement of the last three months of its operation.

27.(1) Where a trade union applies under section 24 for certification as the bargaining agent for a unit that the trade union considers appropriate for collective bargaining, the Board shall determine the unit that, in the opinion of the Board, is appropriate for collective bargaining.

(2) In determining whether a unit constitutes a unit that is appropriate for collective bargaining, the Board may include any employees in or exclude any employees from the unit proposed by the trade union.

29.(1) The Board may, in any case, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit.

47.(1) Where the Governor in Council deletes the name of any portion of the public service of Canada specified from time to time in Part I or II of Schedule I to the Public Service Staff Relations Act and that portion of the public service of Canada is established as or becomes a part of a corporation to which this Part applies, or where a portion of the public service of Canada included in a portion of the public service of Canada so specified in Part I or II of Schedule

I to that Act is severed from the portion in which it was included and established as or becomes a part of a corporation to which this Part applies,

(a) a collective agreement that applies to any employees in that portion of the public service of Canada and that is in force at the time the portion of the public service of Canada is established as or becomes a part of such a corporation continues in force, subject to subsections (3) to (7), until its term expires; and

(b) the Public Service Staff Relations Act applies in all respects to the interpretation and application of the collective agreement.

(2) A trade union may apply to the Board for certification as the bargaining agent for the employees affected by a collective agreement referred to in subsection (1), but may so apply only during a period in which an application for certification of a trade union is authorized to be made under section 24.

(3) Where the employees in a portion of the public service of Canada that is established as or becomes a part of a corporation to which this Part applies are bound by a collective agreement, the corporation, as employer of the employees, or any bargaining agent affected by the change in employment, may, not later than thirty days after the date the portion of the public service of Canada is established as or becomes a part of the corporation, apply to the Board for an order determining the matters referred to in subsection (4).

(4) Where an application is made under subsection (3) by a corporation or bargaining agent, the Board, by order, shall

(a) determine whether the employees of the corporation who are bound by any collective agreement constitute one or more units appropriate for collective bargaining;

(b) determine which trade union shall be the bargaining agent for the employees in each such unit; and

(c) in respect of each collective agreement that applies to employees of the corporation,

(i) determine whether the collective agreement shall remain in force, and

(ii) if the collective agreement is to remain in force, determine whether the collective agreement shall remain in force until the expiration of its term or expire on such earlier date as the Board may fix."

IV

These applications raise the following issues:

1. Is the Yukon Hospital Corporation a corporation to which Part I of the Code applies?
2. Are the certification applications filed in a timely fashion?
3. Which bargaining unit or bargaining units is or are appropriate for collective bargaining?
4. Which employees (management, confidential capacity, casuals, petitioners) should be excluded from the appropriate unit or units?

V

The parties have made several lengthy and detailed submissions in the context of these applications which need not be repeated here but can be profitably summarized as follows. It is common ground between the parties that, whether or not section 47 of the Code applies to the transfer, Part I of the Code applies to the Yukon Hospital Corporation by virtue of the definition of federal work, undertaking or business contained in section 2(i) of the Code.

Other than its agreement on that issue, the employer's position is as follows: (1) the employer seeks a single all employee bargaining unit comprised of non-professional and professional employees; (2) the employer seeks the exclusion of all casual employees; (3) the employer seeks exclusion of certain positions from the bargaining unit on grounds that the incumbents thereof perform management functions or are employed in a confidential capacity respecting industrial relations; (4) the employer says that the Board has jurisdiction to deal with the applications and that they are timely.

PSAC, on the other hand: (1) submits that the Board should deal with the issues raised by the transfer of the hospital to the jurisdiction of the Board in the context of section 47 of the Code notwithstanding it has also filed applications for certification; (2) PSAC submits that two bargaining units that is to say a non-professional unit and a professional unit are appropriate for bargaining in the circumstances; (3) PSAC submits that casual employees should not be excluded from their appropriate bargaining units and; (4) PSAC contests most of the exclusions proposed by the employer on the grounds that the incumbents thereof do not perform management functions or are not employed in a confidential capacity respecting industrial relations.

PIPS for its part, takes the following position: (1) it agrees that a two bargaining unit structure, one for professional employees, and one for the remaining employees, is appropriate; (2) it submits that the application for certification by PSAC for a unit of professional employees is untimely since it claims that a collective agreement remains in place for these employees and; (3) PIPS also submits that the casual employees should not be excluded from the appropriate bargaining unit and also contests most of the management and confidential exclusions proposed by the employer.

VI

Does section 47 apply to the transfer of the Whitehorse General Hospital to the Yukon Hospital Corporation? In the Board's view, the wording of section 47(1) is quite clear: Section 47 applies only when there is a transfer to a corporation to which this Part applies.

"47.(1) Where the Governor in Council deletes the name of any portion of the public service of Canada specified from time to time in Part I or II of Schedule I to the Public Service Staff Relations Act and that portion of the public service of Canada is established as or becomes a part of a corporation to which this Part applies, or where a portion of the public service of Canada included in a portion of the public service of Canada so specified in Part I or II of Schedule I to that Act is severed from the portion in which it was included and established as or becomes a part of a corporation to which this Part applies, ...

(emphasis added)

By virtue of sections 4 and 5(1) of the Code, supra, Part I applies in respect of (1) employees who are employed on or in connection with the operation of any federal work, undertaking or business and (2) any corporation established to perform any function or duty on behalf of the Government of Canada. Therefore, the corporations falling under section 47 must necessarily be the corporations described in section 5(a), that is, any corporation established to perform any function or duty on behalf of the Government of Canada, as these are the only corporations to which the Code is made applicable *qua* corporation. (See Northern Sales Company Limited (1980), 40 di 128; [1980] 3 Can LRBR 15; and 80 CLLC 16,033 (CLRb no. 245)). This interpretation meets the purpose of section 47, which was enacted to accommodate the transfer of governmental functions accomplished by the Public Service of Canada to "semi-public" corporations whose activities remain more or less in the public domain. The

legislator has provided a mechanism that preserves the collective agreement beyond the transfer from public to semi-public sector and that allows an orderly restructuring of the bargaining relationship between the new players, that is, the semi-public corporation, the transferred public servants and their bargaining agents. The successorship provisions in section 47 do not preserve a collective agreement concluded under the Public Service Staff Relations Act when the governmental operations are transferred to the private sector, (see Northern Sales Company Limited, supra) unless the statute creating the corporation explicitly incorporates the provisions similar to section 47 of the Code. In our view the corporations which are covered by section 5(1) must be corporations that are agents for the crown. These are distinguishable from mere "crown corporations" which are not necessarily agents for the crown. For instance, in Canada Labour Relations Board et al. v. Canadian National Railway Company, (1975) 1 SCR 786, the Supreme Court said the following:

"What then is to be made of the words 'on behalf of'? They are words of agency, and although such agency, where the crown is the principal, is normally expressed in the legislation establishing the agent, it may also be shown by necessary intendment under the terms of the legislation."

(page 795; emphasis added)

In the absence of an explicit indication by the legislator that the public body is an agent of the crown, the courts generally examine the enabling statute as a whole in order to determine the degree of control exercised by the crown over the public body.

Having examined the Yukon Hospital Act in its entirety (it was included in the materials submitted by the parties), we are of the opinion that it does not exhibit the degree of government control over the Yukon Hospital Corporation's day-to-day operations requisite to enable the Board to conclude that the said corporation is an agent of the crown. Rather, in fact, the Yukon Hospital Corporation exercises

substantial discretion to conduct its own affairs within the limit of its statutory powers. Therefore, we are of the opinion that the Yukon Hospital Corporation is not a corporation established to perform any function or duty on behalf of the Government of Canada within the meaning of section 5(1) and consequently is not a corporation to which Part I applies.

It then follows that the three applications pursuant to section 47, namely files 590-29, 590-30 and 590-31 must be dismissed since section 47 does not apply to private sector corporations, even if Yukon Hospital Corporation's labour relations are still subject to the application of the Code by virtue of section 4.

Turning now to the applications for certification the first order of business is to determine whether the applications are timely or not. By virtue of section 24(2) of the Code, this would depend in this case on whether a collective agreement or collective agreements applicable to the units is or are in force at the time the application is made.

Since we are not able to apply the provisions of section 47 to the transfer of the Whitehorse General Hospital to the Yukon Hospital Corporation, it is clear to the Board that there is nothing in the Code which can provide a nexus and make the new employer bound by the terms of the previous master collective agreements. Thus, these previous master agreements do not create a bar to these applications. However, by entering into the Memorandum of Understanding with PSAC and PIPS on January 21, 1991, YHC recognized PSAC and PIPS as bargaining agents for its employees.

The two certification applications are made by PSAC and one of them namely that in file 555-3672 is the equivalent of a raid application where PSAC is seeking certification for a bargaining unit comprised of professional employees who are presently represented by PIPS.

By virtue of section 24(2)(c) or (d), where a collective agreement applicable to the unit is in force, certification application can be made at specified times generally called open periods. Where no collective agreement applicable to the unit is in force, the application can be made at any time.

YHC for a time argued that the above referred to Memorandum of Understanding was a collective agreement. However, in its last submission it changed its mind and stated that the Memorandum of Understanding could not be a collective agreement since it does not have a known and established term. PIPS has always maintained that the Memorandum of Understanding was not a collective agreement and argues that the term of its previous master collective agreement makes PSAC's application untimely. PSAC expressed no position on whether or not the Memorandum of Understanding constitutes a collective agreement.

The Board concludes that the Memorandum of Understanding does not constitute a collective agreement satisfying the requirements of the Code. Not only is it impossible to make it comply with section 67(1) but further, the fact that it recognizes two bargaining agents for a unit or units is also problematic. Since the Memorandum of Understanding is not a collective agreement and since the previous master agreements are not binding, there are no collective agreements applicable to the units in force and the applications for certification can be made at any time. The applications for certification herein are timely and can be entertained.

After having examined the materials in the files and all the submissions of all the parties including the petition of the employees referred to above, the Board finds that two separate bargaining units are appropriate for collective bargaining in the circumstances herein; one for the employees working in general support services (Board file 555-3671), and the other for the professional employees (Board file 555-3672). The Board also finds that the disputed positions of casual employees should be included in their respective appropriate bargaining units as they share a community

of interest with the regular and part-time employees.

The Board has conducted a minute scrutiny of the job descriptions, other materials and all submissions of the parties with respect to the positions which the employer objects to being included in the units on the grounds that the incumbent thereof either perform management functions or are employed in a confidential capacity respecting industrial relations and finds that the position of special project administrative assistant should be excluded because of duties of a confidential nature respecting industrial relations. The employer has failed however to satisfy the burden of showing that the other employees perform management functions (see Vancouver Wharves Ltd. (1974), 5 di 30; [1975] 1 Can LRBR 162; and 74 CLLC 16,118 (CLRB no. 19) and Western Stevedoring Company Limited (1974), 6 di 48 (CLRB no. 27)), and therefore the Board finds that these are employees within the meaning of the Code and are appropriate for inclusion in their respective bargaining units.


The Board therefore grants the application for certification in file 555-3671 in respect of the general support services employees, having satisfied itself that the applicant is a trade union within the meaning of the Code and that a majority of the employees of the employer in the unit determined appropriate by the Board wish to be represented by PSAC. The Board has issued the attached order in both official languages.

With respect to the application for certification for the unit of professional employees, Board file 555-3672, this constitutes a raid and the Board therefore orders that a representation vote be taken pursuant to section 29(1) of the Code. The Board directs that the voting unit be comprised of employees described in section 8(b)(ii) of the Investigating Officer's Report.

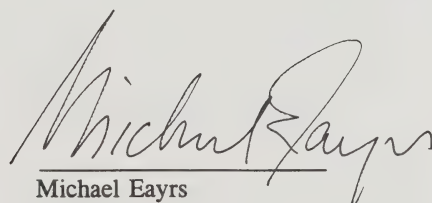
The vote is ordered to ascertain whether these employees wish to continue to be represented by PIPS or whether they wish to be represented by PSAC. Employees eligible to cast a ballot are those employees employed by the employer as of the date of this decision. Mr. Phil J. Kirkland, Regional Director of the Board's Vancouver office is hereby appointed Returning Officer to supervise the vote. He will communicate with the parties in due course.



J. Philippe Morneault
Vice-Chair



Calvin B. Davis
Member



Michael Eayrs
Member

information

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Summary

Canadian Union of Postal Workers, complainant, and Canada Post Corporation, respondent.

Board File: 745-4816
CLRB/CCRT Decision no. 1108
March 2nd, 1995



Résumé

Syndicat des postiers du Canada, plaignant, et Société canadienne des postes, intimée.

Dossier du Conseil: 745-4816
CLRB/CCRT Décision n° 1108
le 2 mars 1995

This complaint, alleging violation of section 94(1)(a) of the Code, was met by a motion to defer to an arbitrator pursuant to section 98(3) of the Code. The Board will first deal with the applicability of that section.

When dealing with such a matter, the Board need not entertain the merits of the complaint. All facts on file are deemed to be uncontested by both parties. The Board exercises its discretion.

For reasons unknown to the Board, the employer failed to provide the union with available documentation regarding provisions of the collective agreement.

The arbitrator Burkett allowed that *subpoena duces tecum* be issued at the hearing of the first grievances.

The grievor lodged additional similar grievances. He feared that without a *subpoena duces tecum*, he would not be in a position to adduce essential evidence to support those additional grievances.

La présente plainte allègue qu'il y a eu violation de l'alinéa 94(1)a) du Code. Il est demandé au Conseil que l'affaire soit renvoyée à l'arbitrage, aux termes du paragraphe 98(3) du Code. Le Conseil examinera d'abord la question de l'applicabilité de cette disposition.

Lorsque le Conseil s'occupe d'une question de ce genre, il n'a pas à s'attarder au bien-fondé de la plainte. Tous les faits au dossier sont réputés être vrais entre les parties. Le Conseil exerce son pouvoir discrétionnaire.

Pour des raisons que le Conseil ignore, l'employeur n'a pas fourni au syndicat des documents concernant les dispositions de la convention collective.

L'arbitre Burkett a autorisé la délivrance d'un *subpoena duces tecum* lors de l'audition des premiers griefs.

Le syndicat a présenté d'autres griefs similaires. Il craignait que, privé d'un *subpoena duces tecum*, il ne puisse produire des éléments de preuve essentiels au soutien de ces griefs additionnels.

Nothing in the file shows that a request to the arbitrator to issue a *subpoena duces tecum* and therefore obtain essential evidence would be denied to the grievor. Arbitrator Burkett has shown ample power to deal effectively with the grievances at issue.

The Board is not an alternate forum to the grievance arbitration process.

The Board refuses to hear the instant complaint filed under section 94(1)(a).

Rien dans le dossier n'indique qu'une demande soumise à l'arbitre en vue de la délivrance d'un *subpoena duces tecum* pour l'obtention des éléments de preuve nécessaires serait rejetée. L'arbitre Burkett a démontré qu'il détient tous les pouvoirs nécessaires pour bien traiter les griefs en question.

Le recours au Conseil ne peut remplacer la procédure de règlement des griefs.

Le Conseil refuse d'entendre la présente plainte déposée en vertu de l'alinéa 94(1)(a).

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Reasons for decision

Canadian Union of Postal Workers,

complainant,

and

Canada Post Corporation,

respondent.

Board File: 745-4816

CLRB/CCRT Decision no. 1108

March 2, 1995.

The Board was composed of Mr. Jean L. Guilbeault, Q.C., Vice-Chair, and Messrs. Michael Eayrs and Patrick H. Shafer, Members.

Appearances

Mr. David I. Bloom, Counsel, assisted by Mr. Tony da Silva, President (CUPW) - London Local, for the complainant;

Mr. John A. Coleman, Counsel, assisted by Mr. Pat Smith, Superintendent, Production, Central and Reporting (PCR), London Mail Processing Plant, and by Mr. Michael Tong, Labour Relations Officer, Central Area, for the respondent.

These reasons for decision were written by Mr. Jean L. Guilbeault, Q.C., Vice-Chair.

The complainant alleges violation of section 94(1)(a) of the Canada Labour Code (Part I - Industrial Relations), which reads as follows.

"94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; ..."

The complainant filed 23 grievances between September 1992 and October 1993 alleging violation of several staffing provisions of the relevant collective agreement. Those grievances were referred to arbitration, and hearings have been ongoing since August 1994.

In order to give evidence to support those grievances, the complainant union relied on documents provided by the employer over a long period of time and generally consisting of statistical information regarding volume of mail and staffing at its postal facilities in London, Ontario. In addition, the union succeeded in convincing arbitrator Burkett to allow that a *subpoena duces tecum* be issued that would give it access to all documents pertaining to the use of casuals and of relief staff as well as to aggregate employee absence for the period from August 1, 1992 to September 1, 1993.

The union lodged similar grievances challenging the use of casuals at the London mail processing plant during the period from November 1993 to January 1995. However, for unknown reasons, the employer stopped providing the union with certain material concerning staffing, material which had previously been provided on a regular basis, thereby depriving the union of information it allegedly needed to support the grievances filed since January 1994.

The employer's failure to provide the union with available documentation regarding the administration of the staffing provisions of the collective agreement constitutes, according to the union, a violation of section 94(1)(a) of the Code. The employer met this complaint with a motion to defer the matter to arbitration pursuant to section 98(3), which reads as follows:

"98. (3) The Board may refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."

Prior to the hearing held in Toronto on January 30, 1995, the parties were advised that the Board would first hear arguments concerning the applicability of section 98(3) of the Code.

When dealing with a matter pursuant to section 98(3), the Board need not entertain the merits of the complaint and thus refrain from determining if an employer did or did not violate section 94(1)(a) of the Code. The facts on file are deemed to be uncontested by both parties. The Board has the discretion to retain jurisdiction or to refuse to hear the matter so it could be referred by the complainant to arbitration.

In the particular circumstances of this case, the Board found that it was in the best interest of both parties to render its decision verbally at the hearing, with written reasons to follow. Having heard the submissions of the parties, the Board decided, and advised them accordingly, at the conclusion of the hearing, that this was indeed a matter which, pursuant to section 98(3), could be referred by the complainant to arbitration.

The award rendered by arbitrator Burkett on September 16, 1994 clearly demonstrates the arbitrator's ample power to deal effectively with the different aspects of the case at issue, and specifically to allay the union's concerns with respect to its ability to obtain crucial material well within the scope of the collective agreement to support its grievances.


Nothing in the file supports the union's allegation that it was deprived of the opportunity of a *subpoena duces tecum* necessary to adduce essential evidence to support the grievances filed since November 1993 being issued. Counsel for the union raised the possibility of such an undesirable situation, but the Board is not convinced of that hypothetical conclusion when confronted with the reality of the award issued on September 16, 1994 by arbitrator Burkett concerning similar grievances.

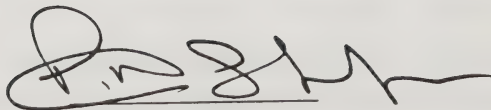
The Board will refrain from deferring a case to arbitration where the issues are not covered by the collective agreement or where they deal with matters of public policy under the Code. (See Canada Post Corporation (1987), 69 di 91 (CLRB no. 620).) Furthermore, the Board's mandate is to interpret and administer the provisions of the Code, not to act as an alternate forum to the grievance arbitration process (Canada Post Corporation (1989), 76 di 212 (CLRB no. 729)).

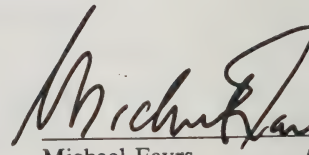
Finally, after reviewing carefully all the facts alleged in this case, the Board finds no statutory right that must be defined or reasserted. Therefore, it refuses, pursuant to its discretionary power under section 98(3), to hear the instant complaint filed under section 94(1)(a) of the Code and confirms its oral decision of January 30, 1995 that the matter could be referred by the complainant to arbitration.

This file is closed.

This is a unanimous decision of the Board.


Jean L. Guibeault, Q.C.
Vice-Chair


Patrick H. Shafer
Member


Michael Eayrs
Member

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Summary

Brotherhood of Maintenance of Way Employees, *complainant*, Canadian National Railway Company, *respondent*.

Résumé

Fraternité des préposés à l'entretien des voies, *plaignante*, Compagnie des chemins de fer nationaux du Canada, *intimée*.

Board File: 745-4706
CCRT/CLRB Decision no. 1109
February 27, 1995

Dossier du Conseil: 745-4706
CCRT/CLRB Décision n° 1109
le 27 février 1995

The union alleged that the employer violated sections 70(1) and 94(1)(a) of the Canada Labour Code (Part I - Industrial Relations) by refusing to deduct regular union dues from the salary of employees who perform management functions, but maintain residual seniority rights pursuant to the collective agreement.

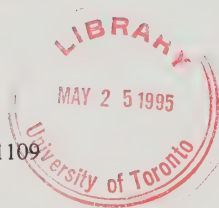
The collective agreement already contains a provision requiring the deduction of union dues from the salary of employees covered by the agreement, and the employer has been making those deductions pursuant to Schedule VIII of the agreement since 1953.

The Board determined that the issue here results from a simple difference of opinion as to the notion of "employee covered by the collective agreement". It is not the principle pertaining to the obligation to deduct union dues which is at issue, but rather whether this obligation exists in the instant case with

Le syndicat allègue que l'employeur a enfreint le paragraphe 70(1) et l'alinéa 94(1)(a) du Code canadien du travail (Partie I - Relations du travail) en refusant de prélever sur le salaire d'employés qui exercent des fonctions de direction, mais qui conservent certains droits d'ancienneté résiduels en vertu de la convention collective, le montant de la cotisation syndicale normale.

La convention collective comporte déjà une disposition prévoyant le prélèvement des cotisations syndicales sur le salaire des employés régis par celle-ci et l'employeur effectue la retenue des cotisations syndicales conformément à l'annexe VIII de la convention depuis 1953.

Le Conseil conclut que le litige résulte d'une simple divergence de vues sur la notion d'«employé régi par la convention collective». Ce n'est pas le principe de l'obligation de prélèvement des cotisations qui est en cause, mais plutôt l'existence de cette obligation en l'espèce à l'égard des employés concernés.



respect to the employees involved.

Even though this question was not submitted to the Board so that it could be determined having regard to the intended scope of the bargaining unit, it does not change the outcome since the question has already been resolved in a binding manner by an arbitrator.

In these circumstances, the Board decided to grant the employer's request to refuse to hear and determine the complaint pursuant to section 98(3) of the Code. The Board has no jurisdiction to review arbitral awards; this is a matter which could be referred to arbitration; and it does not involve a genuine statutory right which the Board must define or reaffirm.

Même si la question n'a pas été soumise au Conseil pour qu'il la détermine en fonction de la portée intentionnelle de l'unité de négociation, cela ne change rien au résultat puisque cette question a déjà été tranchée de façon définitive par un arbitre.

Dans ces conditions, le Conseil juge qu'il n'y a pas lieu de faire droit à la demande de l'employeur de refuser d'instruire la plainte conformément au paragraphe 98(3) du Code. Le Conseil n'est pas compétent pour réviser une décision d'un arbitre de griefs, le cas échéant, un qui pourrait être porté à l'arbitrage. En l'absence, dans l'instance, d'un droit statutairement authentique que le Conseil doit définir ou réaffirmer.

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Reasons for decision

Brotherhood of Maintenance of Way
Employees,

complainant,

and

Canadian National Railway Company,

respondent.

Board File: 745-4706
CCRT/CLRB Decision no. 1109
February 27, 1995

The Board was composed of Mr. J. F. W. Weatherill, Chairman, and Mr. François Bastien and Ms. Véronique L. Marleau, Members. A hearing was held on November 3, 1994, at Montréal.

Appearances

Mr. Marco Gaggino, accompanied by Mr. David W. Brown, senior legal counsel, and Mr. André Trudel, general chairman, for the complainant;
Mr. Raynald Lecavalier, accompanied by Mr. Normand Dionne, director - labour relations, for the respondent.

These reasons for decision were written by Ms. Véronique L. Marleau, Member.

I

On January 4, 1994, the Brotherhood of Maintenance of Way Employees (the Brotherhood) filed with the Board a complaint under section 97 of the Canada Labour Code. This complaint stems from the employer's (CN) refusal to deduct regular union dues from the wages of employees who perform managerial duties, but who retain certain residual seniority rights under the collective agreement.

In its reply to the Brotherhood's complaint, CN raised two preliminary objections. It argued, first, that the Board could not validly entertain the complaint because it was *res judicata*, an arbitrator having already decided the question and, second, that the complaint was untimely because it had not been filed within the time limit specified in section 97(2) of the Code, namely, "not later than ninety days after the date on which the [Brotherhood] knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

At the hearing, which dealt only with CN's preliminary objections, the Brotherhood explained that its "application under sections 16(p)(i), (ii), (vii), 21, 70 and 94(1)(a) of the Canada Labour Code" essentially involved two complaints: a complaint of unfair labour practice alleging violation of section 94(1)(a) of the Code (interference by the employer with the administration of the union), and a complaint alleging violation of section 70(1) of the Code (obligation to include in the collective agreement a provision requiring the employer to deduct the amount of the regular union dues from the wages of each employee in the unit affected by the collective agreement). CN, for its part, abandoned its *res judicata* objection, raising instead the applicability of section 98(3) of the Code which empowers the Board to "refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."

These reasons deal with these preliminary issues and particularly with the Board's exercise of its discretion under section 98(3) of the Code.

II

The Brotherhood's application was the subject of a number of proceedings that culminated in the present decision. For a clear understanding of the case, we shall describe them briefly.

In the spring of 1992, during the final round of bargaining that led to the renewal of the collective agreement, the Brotherhood asked the employer to deduct union dues from the wages of employees who occupy managerial or non-unionized positions, but who continue to accrue seniority under the said collective agreement ("the employees concerned"), as it does for the other employees represented by the Brotherhood. Before being promoted to managerial positions, these employees worked in the maintenance of way department. In such a case, the collective agreement provides:

"16.4 The name of an employee who has been or is promoted to an official or excepted position with the Company will be continued on the seniority list for the group from which promoted, and he shall retain his seniority rights and continue to accumulate seniority while so employed. If released from such official or excepted position within a period of one year, he may return to his former position; after one year he may only displace the junior employee or bid a vacancy in his seniority group on his basic seniority territory."

The other relevant provisions of the collective agreement read as follows:

"1.1 Unless otherwise provided, this Agreement covers all Maintenance of Way employees for whom rates of pay are provided in Agreements Supplemental hereto."

...

38.1 The Agreement signed at Montreal, Quebec on February 7, 1953 by and between the Railways and the respective labour organizations providing in Article 3 for the deduction of dues is made a part hereto, as Appendix VIII, as are subsequent amendments thereto, and employees hereby will be subject to these provisions."

...

*APPENDIX VIII
UNION DUES AGREEMENT
Deduction of Dues*

1. The Railways shall deduct on the payroll for the pay period which contains the 24th day of each month from wages due and payable to each employee coming within the scope of this Collective Agreement an amount equivalent to the uniform monthly union dues of the appropriate Organization, subject to the conditions and exceptions set forth hereunder.

2. The amount to be deducted shall be equivalent to the uniform, regular dues payment of the appropriate Organization which is signatory to the Agreement covering the position in which the employee concerned is engaged and shall not include initiation fees or special assessments. The amount to be deducted shall not be changed during the term of the applicable Agreement excepting to conform with a change in the amount of regular dues of the appropriate Organization in accordance with its constitutional provisions. The provisions of this Article shall be applicable to each individual Organization on receipt by the Railway concerned of notice in writing from such Organization of the amount of regular monthly dues.

3. Employees filling positions of a supervisory or confidential nature not subject to all the rules of the applicable Agreement as may be mutually agreed between the designated officers of the individual Railway and of the Organization concerned shall be exempted from dues deduction.

4. Membership in any of the Organizations signatory hereto shall be available to any employee eligible under the constitution of the applicable Organization on payment of the initiation or reinstatement fees uniformly required of all other such applicants by the local lodge or division concerned. Membership shall not be denied for reasons of race, national origin, colour or religion."

The Brotherhood was of the view that CN was obliged to deduct dues from the wages of the employees concerned because, in the Brotherhood's opinion, these employees were still governed by the collective agreement in that clause 16.4 conferred on them

an important benefit, namely, the preservation of their seniority rights should they return to the bargaining unit.

CN denied this request because it considered that these employees had been promoted out of the bargaining unit and, as a result, were no longer unionized employees governed by the collective agreement. This dispute led to an impasse which almost degenerated into a strike. To resolve the issue, the parties concluded a letter of understanding dated May 1, 1992 which provides as follows:

*"Mr. Terry Lineker
Assistant Vice-President
Labour Relations, CN Rail*

Dear Sir:

One of the proposals made by the Union in the current negotiations, relates to the issue of the payment of Union dues by Union members working in a management capacity. In this period of good faith collective bargaining, the Union is willing to put this issue into abeyance for the present time. However, this is done so with the understanding that the Union is not in any way derogating from its original position and at any time during the life of the proposed agreement the Union may, at its discretion, approach the Company with a view to negotiating further this issue or refer the issue to an Arbitrator, tribunal or court for binding resolution.

If you are in agreement with the above, please signify by signing in the appropriate space below.

I concur:

*R.A. Bowden
Chairman, B.M.W.E.*

*T. Lineker
Chairman, CN Rail"*

(emphasis added)

The Brotherhood then availed itself of the terms and conditions of this letter of understanding and referred the issue to Arbitrator Michel Picher who was asked "... to interpret the provisions of the current collective agreement and to determine whether its terms require the deduction of union dues for management personnel who retain residual seniority rights under it" (arbitral award of September 17, 1993, CROA, no. 2389, Michel Picher, arbitrator, page 3).

The parties each submitted their own statement of facts to the arbitrator, and in its supporting brief, the Brotherhood summarized its position as follows:

"57. The Brotherhood's position in this case can be summarized as follows:

- 1) That Article 16.4 of Agreement 10.1 allows bargaining unit members who promote to supervisory positions to continue to accumulate seniority;*
- 2) That paragraph 1 of Appendix VIII, the union dues agreement, provides the general rule that all bargaining unit employees shall have dues deducted from their wages;*
- 3) That paragraph 3 of Appendix VIII provides an exception to this general rule concerning Article 16.4 employees;*
- 4) That on December 31, 1991, the Brotherhood's collective agreement with the Company expired;*
- 5) That Appendix VIII of the Agreement 10.1 constitutes an integral part of Agreement 10.1 and, therefore, expired when it did;*
- 6) That the Brotherhood had, as one of its contract demands, the abolishment of the protection provided by paragraph 3 of Appendix VIII;*
- 7) That s. 70 of the Canada Labour Code provides that, at a union's request, a check-off provision shall be included in its collective agreement;*

- 8) *That, as a result of this, paragraph 1 of Appendix VIII is present by operation of law;*
- 9) *That, in the absence of agreement on paragraph 3, paragraph 1, the legal rule, must apply;*
- 10) *That, Article IV of the 1953 union dues agreement itself reveals the intention of the parties that the agreement was drafted to be revisable or terminable upon provision of proper notice;*
- 11) *That while the wording of paragraph 3 of Appendix VIII is vague and unclear, it would be unreasonable to interpret it in such a manner that would deny the union's inherent and statutorily bestowed right to determine which of its bargaining unit members pay dues;*
- 12) *That, given the current state of the railway industry, it is only fair and proper that these employees pay dues given the tremendous benefit that the collective agreement provides them."*

(Brief presented by the Brotherhood to Arbitrator Michel Picher, pages 20-21; emphasis in the original)

For these reasons, the Brotherhood asked the arbitrator to make the following order:

"G. ORDER REQUESTED:

The Brotherhood requests that the Arbitrator find in its favour and order that the Company deduct dues from the wages of all bargaining unit members working in supervisory positions in an amount to be determined by the Brotherhood retroactive to July 27, 1992, the date at which formal request was made to the Company for payment."

(Brief presented by the Brotherhood to Arbitrator Michel Picher, supra, page 21)

After analysing the relevant provisions of the collective agreement in the light of section 70(1) of the Code, Arbitrator Picher concluded that the employees concerned

who perform managerial duties and, among other things, whose rate of pay is not determined by the collective agreement, were employees promoted out of the bargaining unit and, as such, were not members of the bargaining unit governed by the collective agreement:

"In the result, the Arbitrator can see no basis upon which the collective agreement, read together with the Canada Labour Code, can be construed in a manner which would support the interpretation advanced by the Brotherhood. Clearly, the practice of many years by the parties reflects a mutual understanding that union dues are not to be deducted from persons who are not actively employed within the bargaining unit. That understanding is well reflected in the language of article 1.1 which restricts the application of the agreement to employees for whom rates of pay are provided within the supplemental agreements, unless otherwise specifically provided. Similarly, the language of article 38.1 and Appendix VIII of the agreement reveals that the bargaining unit is the basis for union dues check-off. For example, paragraph 2 of Appendix VIII speaks of dues being deducted and paid to the union '... which is signatory to the agreement covering the position in which the employee concerned is engaged ...'. Finally, in light of the practice of many years, as noted above, the Arbitrator cannot accept the suggestion of the bargaining agent to the effect that paragraph 3 of Appendix VIII was ever mutually intended to extend to all managers who were formerly bargaining unit employees. That paragraph speaks to 'employees' who fill supervisory or confidential positions, and must be construed in a manner consistent with article 1.1 of the collective agreement to apply to 'employees' who are supervisory foremen and persons in similar classifications whose rates of pay are provided for in agreements supplemental to the collective agreement."

(Canadian National Railway Company and Brotherhood of Maintenance of Way Employees, CROA no. 2389, September 17, 1993 (Picher), page 7)

Dissatisfied with this decision, the Brotherhood then turned to the Board. It now argues that CN's refusal to deduct unions dues from the wages of these employees and

to remit this amount to the union in accordance with the collective agreement contravenes section 70(1) of the Code which stipulates the following:

"70. (1) Where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union forthwith. "

The Brotherhood claims that the failure to comply with section 70(1) constitutes not only interference with the administration of the union under section 94(1)(a), and hence an unfair labour practice, but also a contravention *per se* of the Code that opens the way to an order under section 21. That section reads as follows:

"21. The Board shall exercise such powers and perform such duties as are conferred or imposed on it by this Part, or as may be incidental to the attainment of the objects of this Part, including, without restricting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Part, with any regulation made under this Part or with any decision made in respect of a matter before the Board. "

According to the Brotherhood, the article in the collective agreement is unlawful because its scope is narrower than the provisions of section 70(1) of the Code. Alternatively, it argues that CN's interpretation of the scope of the article is inconsistent with section 70(1) of the Code because this interpretation does not cover all the employees governed by the collective agreement.

In the Brotherhood's view, in order to ensure compliance with 70(1), CN would have to include in the collective agreement an additional union check-off clause that would

cover the employees concerned, or otherwise recognize that the existing union check-off provisions of the collective agreement apply to the employees concerned.

The Brotherhood alleges that "Mr. Picher's award in no way settles the question of CN's refusal to deduct and remit to the BMW union dues for a number of CN employees who are covered and/or affected in whole or in part by the collective agreement between CN and the BMW" (translation) because "Mr. Picher rendered his award without hearing any evidence concerning the type of duties performed by the employees who were the subject of the grievance before him" (translation). The Brotherhood continues to maintain that "each employee who is employed as a manager and whose seniority is protected by article 16.4 of the collective agreement" (translation) is an employee governed by the collective agreement; hence CN's obligation to deduct dues and the unfair labour practice arising from its failure to fulfil this obligation.

It is against this background that the Brotherhood is now asking the Board to render the following decision:

"D. DECISION SOUGHT

The BMW requests the following:

- (1) *A declaration to the effect that all the persons whose names appear on the list attached hereto as Appendix 6 are employees within the meaning of the Code;*
- (2) *A declaration to the effect that all the persons whose names appear on the list attached hereto as Appendix 6 are affected and/or governed in whole or in part by the collective agreement submitted in support of this application as Appendix 2;*
- (3) *A declaration to the effect that CN has an obligation to deduct from the wages of the persons whose names appear on the list attached hereto as Appendix 6, the amount of the*

regular dues of the BMWÉ and that CN has an obligation to remit this amount to the BMWÉ;

- (4) *A declaration to the effect that CN's neglecting and/or refusing to deduct from the wages of the persons whose names appear on the list attached hereto as Appendix 6, the amount of the regular dues of the BMWÉ and to remit this amount to the BMWÉ constitutes an unfair labour practice;*
- (6) *An order against CN enjoining it to pay, with interest, to the BMWÉ the amount of the union dues of the BMWÉ that it unlawfully refused and/or neglected to deduct from the wages of the persons whose names appear on the list attached hereto as Appendix 6, with effect retroactive to December 3, 1992."*

(Application by the Brotherhood of December 24, 1993, page 3; translation; emphasis added)

III

CN argued that the Board must exercise its discretion and refuse to hear the complaint pursuant to section 98(3) of the Code, since this is quite clearly a matter that could be referred to an arbitrator under the provisions of the collective agreement. The history of the dispute between the parties confirms the merits of this approach since before the Brotherhood filed its complaint with the Board, it availed itself of the arbitration procedure in order to have the question of its right to the deduction of union dues for the employees concerned determined. The Brotherhood therefore recognized that this was indeed a matter that could be referred to an arbitrator under the collective agreement.

The Brotherhood, for its part, argued that one must look beneath the surface and that even if there were similarities between its application and the grievance referred to arbitrator Picher, what the Board was asked to do here was not to interpret the collective agreement, but to determine whether CN contravened the Code. The matter

before the Board could not therefore be referred to an arbitrator because an arbitrator would lack jurisdiction to determine the complaint. Arbitrator Picher concluded that the collective agreement did not apply to the employees concerned. However, the Brotherhood had a different purpose in filing the present application: to obtain from the Board a declaration that under section 70(1) of the Code, the collective agreement must contain a union check-off clause for this group of employees.

According to the Brotherhood, section 70(1) requires that the collective agreement contain this type of clause for the employees concerned because section 70(1) is broader in scope than the collective agreement. We have here a violation of the Code, notwithstanding the provisions of the collective agreement. Moreover, because an arbitrator lacks jurisdiction to rule that there had been a contravention of section 70(1) of the Code, or to declare that there had been interference in the union's affairs and to grant redress, the Board could not refuse, pursuant to section 98(3), to hear the complaint. This provision applied only to section 97 complaints and not to complaints like the one made here under section 70. The Brotherhood relied in this regard on Okanagan Helicopters Ltd. (1985), 62 di 21; 10 CLRBR (NS) 385; and 85 CLLC 16,037 (CLRBR no. 521), which was set aside for other reasons by the Federal Court of Appeal in Okanagan Helicopters Ltd. v. Canadian Helicopter Pilots' Association, [1986] 2 F.C. 56.

IV

Under section 98(3), the right of the Board to refuse to hear a complaint depends solely on whether the matter "could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board." The answer to this question depends on the nature of the dispute between the parties. If this dispute can be resolved entirely from an interpretation and application of the collective agreement, the Board can refuse to hear the complaint under section 98(3) of the Code.

The Board has repeatedly held that where a collective bargaining system is in place, it should hear complaints only where circumstances outside the scope of the collective agreement warrant the Board's intervention. In other words, in the present case, there must be a "genuine statutory right" that the Board must "define" or "reaffirm" (see Canada Post Corporation (1990), 81 di 28; and 12 CLRBR (2d) 117 (CLRB no. 800), page 38, which adopts the approach taken in Canada Post Corporation (1989), 76 di 212 (CLRB no. 729), and which the Board reaffirmed in its subsequent decisions, in particular in Canada Post Corporation (1992), 87 di 26 (CLRB no. 915); and Sandra Castro-Martin et al. (1992), 88 di 104 (CLRB no. 943)). Evidently, this is the position that the Brotherhood takes when it argues that section 70(1) of the Code is broader in scope than the union check-off provision of the collective agreement. But exactly what is the situation in this regard?

V

The collective agreement already contains a provision for the deduction of union dues from the wages of the employees governed by this agreement, and CN is not questioning its obligation to deduct the dues, except in the present circumstances. As the above-quoted article 38.1 of the collective agreement confirms, CN has been deducting union dues in accordance with Appendix VIII of the agreement since 1953. However, according to CN, it is not obliged to do so in the instant case because the employees concerned are not governed by the collective agreement.

The disagreement that is, in the instant case, at the heart of the dispute between the parties is not therefore over the union check-off provision, but rather its applicability to the employees concerned. The Brotherhood itself recognizes that the disagreement is over the notion of "employee coming within the scope of the collective agreement." The letter from R.A. Bowden, System Federation General Chairman, to T.R. Lineker, Assistant Vice-President, Labour Relations, at CN, is most explicit in this regard:

"Dear Sir:

As you are aware, the BMW and CN recently concluded negotiations for a new two-year collective agreement.

One issue raised by the Brotherhood during this round of negotiations concerned the payment of union dues by BMW members working in management positions. As you know, such employees do not currently pay dues or assessments of any kind yet continue to receive the benefits of union security primarily in the form of protected seniority.

Notwithstanding the fact that this issue reached an impasse during negotiations, the Brotherhood, in the spirit of good faith collective bargaining, decided to agree to place the issue in abeyance until a later date.

Since the conclusion of contract negotiations, no further progress has been made between the parties towards a resolution of this matter.

In view of this, the Brotherhood is now in a position where it has no choice but to act unilaterally for the benefit of our membership as a whole.

You will note that Section 1 of Appendix VIII of Agreement 10.1 provides that all employees coming within the scope of the collective agreement shall have union dues deducted from their wages. Section 3 of Appendix VIII provides for an exception to this general rule but only where there is mutual agreement to that effect between the Brotherhood and the Company. As is evident from the Brotherhood's demands during the last round of negotiations, there is currently no such mutual consent. Attached you will find a copy of a letter signed by yourself that establishes beyond any doubt that the Company recognizes this lack of consensus.

With this in mind, the Brotherhood hereby formally and officially requests, as per the relevant provisions of Article 38.1 and Appendix VIII of Agreement 10.1, that the Company commence forthwith to deduct, and to remit to the Brotherhood, union dues from the wages payable to each management employee whose seniority is protected pursuant to Article 16.4 of Agreement 10.1.

Trusting this is satisfactory, I remain,

Yours truly,

*R.A. Bowden
System Federation
General Chairman"*

(emphasis added)

What determines the applicability of the collective agreement and more particularly of its union check-off provision to the employees concerned is not the provisions of section 70(1), which merely enshrine in the Code the principle of the "Rand formula", but rather the bargaining unit as defined in the certification order issued by the Board.

The right of a union to require the deduction of union dues is indeed related to the status of employees "coming within the scope of the collective agreement," and this notion refers to the bargaining unit as defined in the certification order, because it is this certificate that determines the composition of a bargaining unit to which a collective agree can apply, and hence the employees likely to come within its scope. In this regard, the French version of section 56 of the Code leaves no doubt:

"56. Pour l'application de la présente partie et sous réserve des dispositions contraires de celle-ci, la convention collective conclue entre l'agent négociateur et l'employeur lie l'agent négociateur, les employés de l'unité de négociation régie par la convention et l'employeur."

(emphasis added)

The English version of this section is even more explicit:

"56. A collective agreement entered into between a bargaining agent and an employer in respect of a bargaining unit is, subject to

and for the purposes of this Part, binding on the bargaining agent, every employee in the bargaining unit and the employer. "

(emphasis added)

It was also in reference to the bargaining unit that the Woods Task Force contemplated the notion of union security and the deduction of union dues (see Canadian Industrial Relations: The Report of the Task Force on Labour Relations (Ottawa: Privy Council Office, December 1986) (Chair: H.D. Woods), paragraphs 481-482).

In the present case, therefore, the dispute does not turn on the absence from the collective agreement of a provision requiring the deduction of union dues as contemplated by section 70(1) of the Code, but rather on the scope of the bargaining unit, which determines whether or not this provision applies to the employees concerned. How else can one interpret the Brotherhood's complaint when the conclusion sought is specifically a declaration under section 16(p) of the Code "to the effect that all the persons [concerned] ... are employees within the meaning of the Code" and "are affected and/or governed in whole or in part by the collective agreement..." In this context, the Board cannot accept the Brotherhood's argument that the dispute concerns the scope of section 70(1) of the Code.

The Brotherhood relied on Okanagan Helicopters Ltd., *supra*, in support of this position. The Board does not see the relevance of that decision, since the facts in that case in no way resemble those of the present case. Unlike the situation in the present case, in Okanagan the employer had refused to include in the collective agreement any provision whatsoever requiring the deduction and remittance of union dues for the employees in the bargaining unit.

VI

If the issue here is one of interpretation of the scope of the bargaining unit, it is appropriate to point out that, in the instant case, the Board does not have before it an application to update the certification order which could have been filed under section 18 of the Code. The purpose of this type of application is to obtain a definition of the real composition of a bargaining unit. Nor does the Board have before it the question of the status of the employees concerned as part of a reference under section 65(1) of the Code. All that is before the Board is a complaint under section 97 of the Code.

A section 97 complaint is not a procedure aimed at enabling a party to obtain a declaratory judgment on the status of a group of employees. Of course, section 16(p) of the Code, on which the Brotherhood relies in support of its application, does empower the Board, in disposing of any application before it, to determine the employee status of a person within the meaning of the Code (16(p)(i)), whether the person performs management functions (16(p)(ii)) or is bound by a collective agreement (16(p)(vii)). However, as Pratte J. of the Federal Court of Appeal stated in Re Latrémouille and Canada Labour Relations Board et al. (1985), 17 D.L.R. (4th) 709; and 57 N.R. 188 (F.C.A.), at pages 714; and 191, "*Section 118 [16] does not authorize the Board to rule on a proceeding undertaken for the sole purpose of having the Board exercise the powers set out in the section...*" Pratte J. relied in this regard on the statement of Beetz J. in Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board, [1984] 2 S.C.R. 412:

"Section 118(p) of the Code allows the Board to resolve questions with which it may be presented in the course of a hearing in progress before it, so that it can make the executory decisions which it is authorized to make by other provisions; but I do not consider that it gives the Board the power to make further executory orders as part of its final decision."

(page 433; emphasis added)

VII

Be that as it may, the Board recognized previously that a disagreement over the applicability of a collective agreement could be settled through arbitration (see Premier Cablesystems Ltd. (1981), 45 di 221; [1982] 1 Can LRBR 163; and 82 CLLC 16,140 (CLRB no. 336)). Indeed, in order to decide a question relating to the interpretation and application of the collective agreement, an arbitrator often must first determine its applicability. Moreover, the Board previously held that "the Board's jurisdiction under section 65 is not exclusive and that an arbitrator has the authority to answer the questions that may rightfully be referred to the Board under section 65" (see Canada Post Corporation (1990), 80 di 30 (CLRB no. 784), page 36). In this case, the Board adopted the analysis of Mr. George Adams (now Adams J.) acting as arbitrator in Re Bell Canada and Communications Workers of Canada (1980), 27 L.A.C. (2d) 163:

"The outcome to this grievance is very dependent on the meaning to be given to the various provisions of the Canada Labour Code. There is nothing contrary to principle in a board of arbitration construing a statute that bears on its mandate, although the standard of judicial review on its determination of a statute's meaning is a much stricter standard: see Re U.S.W., Local 2894 and Galt Metal Industries Ltd. (1974), 5 L.A.C. (2d) 336n, 46 D.L.R. (3d) 150, [1975] 1 S.C.R. 517, sub nom. McLeod et al. v. Egan et al. (S.C.C.); Re Bradburn et al. and Wentworth Arms Hotel Ltd. et al. (1978), 94 D.L.R. (3d) 161, [1979] 1 S.C.R. 846, 79 CLLC para. 14,189..."

(page 170)

In any event, the Brotherhood can hardly claim now that this question is not arbitrable and that it could not be decided as a matter relating to the interpretation and application of the collective agreement. Before turning to the Board, the Brotherhood, on its own initiative, submitted the question of the status of the employees concerned

to an arbitrator for a final decision, in accordance with the terms and conditions of the letter of understanding that it had signed with the employer, with full knowledge of the facts. In addition, while the question was before Arbitrator Picher, the Brotherhood did not request that it be referred to the Board pursuant to section 65 of the Code for "hearing and determination".

Arbitrator Picher concluded that the employer had no obligation to deduct dues for the employees concerned because these employees were not governed by the collective agreement. There was no such obligation, he concluded, not only because the parties had never considered these employees to be covered by the agreement, but also because they were not members of the bargaining unit. Arbitrator Picher determined that article 16.4 of the collective agreement, on which the Brotherhood relies in claiming to represent the employees concerned (and which is nothing more than a type of stipulation for the benefit of a third party), was not a sufficient basis to conclude that employees who could benefit from its provisions were employees coming within the scope of the collective agreement:

"... In light of the history of the provision, the Arbitrator cannot find that paragraph 3 of Appendix VIII was intended at any time since it's [sic] inception to apply to all managerial or non-scheduled personnel. In my view the collective agreement makes a clear distinction between persons 'promoted to an official or excepted position' (article 16.4) and bargaining unit employees holding positions of a supervisory or confidential nature (paragraph 3 of Appendix VIII).

...

... The record before the Arbitrator discloses, without controversy, that for close to forty years the understanding between the parties appears to have been that promoted management personnel, including promoted management personnel who retain residual seniority rights under article 16.4 of the collective agreement, have not been employees coming within the scope of the collective agreement for the purposes of paragraph 1 of Appendix VIII.

Moreover, with the exception of article 16.4, they do not appear to be covered by any other provision of the collective agreement.

... On balance, the language of paragraph 1 of Appendix VIII appears to address the deduction of dues for persons who are active wage earners working and being paid under the terms of the collective agreement. That interpretation is consistent with the ability of the Brotherhood to verify the amount of dues paid against the wages earned by the employees, based on rates in the collective agreement. The Brotherhood has no knowledge of the salaries of management personnel and is not in a position to verify the accuracy of dues deductions for such persons. Neither the definition of 'employee' in section 1.1 of the agreement nor the history and practice of some 40 years would support the conclusion urged by the Brotherhood."

(Canadian National Railway Company and Brotherhood of Maintenance of Way Employees, *supra*, pages 5-6)

Further, Arbitrator Picher concluded that the agreement did not give the Brotherhood fewer rights than it had under section 70(1) of the Code:

"Can it be said that the terms of section 70 of the Canada Labour Code have changed the result? I think not. That section speaks very explicitly to the rights of a bargaining agent to the deduction of dues '... for employees in a bargaining unit ...'. Further, the provision with respect to the check-off of dues which is statutorily included in the collective agreement requires the deduction of dues from the wages 'of each employee in the unit affected by the collective agreement'. In the result, the use of the word 'unit' and the phrase 'bargaining unit' clearly circumscribes the ambit of employees in respect of whom the statutory obligation of dues check-off is to apply.

Needless to say, much jurisprudence has evolved with respect to the fashioning of appropriate bargaining units by labour boards in the course of the certification of unions. And the concept of the bargaining unit is well understood in arbitration awards dealing with the protection of the integrity of the bargaining unit by negotiated collective agreement provisions such as prohibitions against contracting out and the assignment of bargaining unit work to non-unit personnel, including supervisors and managers. When

section 70.1 of the Canada Labour Code is interpreted in light of well-established industrial relations norms, there can be little doubt that Parliament intended the dues check-off provision to apply to employees in the bargaining unit which is covered by the collective agreement in question, that is to say persons who earn wages under the terms of that collective agreement. The provisions of section 70 of the Code cannot, in my view, be fairly interpreted as establishing an obligation on the part of the Company to mandatorily deduct union dues from managers who are no longer members of the bargaining unit, notwithstanding that they may retain residual seniority rights and the ability to some day resume the status of bargaining unit employees."

(Canadian National Railway Company and Brotherhood of Maintenance of Way Employees, supra, pages 6-7)

VIII

Even assuming the facts alleged in the Brotherhood's complaint to be true, the Board could not conclude that there was any contravention of sections 70(1) and 94(1)(a) of the Code because the problem in the present case has nothing to do with these provisions. The problem involves a simple difference of opinion over the notion of "employee coming within the scope of the collective agreement," and this question was not put to the Board in terms of the applicability of the collective agreement so that the Board could determine it having regard to the intended scope of the bargaining unit. On the other hand, having regard to the interpretation and application of the collective agreement, this same question had already been resolved in a binding manner by Arbitrator Michel Picher, and while the question was before him, it was not referred to the Board under section 65 of the Code "for hearing and determination."

The Board has no jurisdiction to review the decision of a grievance arbitrator and in particular, the merits of his interpretation of the relevant articles of a collective agreement. Section 58 of the Code expressly provides that these decisions are final

and cannot be either questioned or reviewed (see in this regard Teamsters Union Local 938 et al. v. Gerald M. Massicotte et al., [1982] 1 S.C.R. 710; Brotherhood of Railway, Airline and Steamship Clerks, System Board of Adjustment no. 435 v. Canadian Pacific Air Lines Limited et al., file no. CA001759, June 19, 1984 (B.C.C.A.); and Aditya N. Varma (1991), 86 di 66; 15 CLRBR (2d) 307; and 92 CLLC 16,020 (CLRB no. 894)).

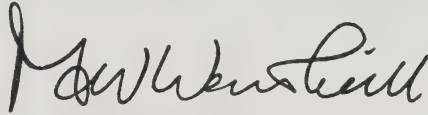
Yet, this is essentially what the Brotherhood is asking when it alleges in support of its complaint that "Mr. Picher rendered his award without hearing any evidence concerning the type of duties performed by the employees who were the subject of the grievance before him."

The fact that in the instant case, the Brotherhood's complaint follows an arbitral award that had already decided the question as it relates to the interpretation and application of the collective agreement also means that for the Board to find in the Brotherhood's favour, it would have to conclude that CN's conduct contravened the Code because it complied with Arbitrator Picher's award. Even assuming the case as one that the Board could not refuse to hear under section 98(3) of the Code, it can hardly see how it could give in to such an approach.

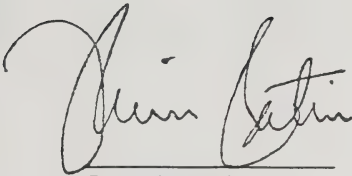
In the circumstances, the Board therefore decides that the employer's request should be granted. Since this case is one which could be referred to arbitration and since there is no genuine statutory right here that the Board must "define" or "reaffirm," the Board refuses to hear the complaint, pursuant to section 98(3) of the Code.

Given this conclusion, there is no need to decide CN's second objection concerning the timeliness of the complaint, in reply to which the Brotherhood alleged the ongoing nature of its complaint.

For all these reasons, the complaint is dismissed.



J.F.W. Weatherill
Chairman



François Bastien
Member



Véronique L. Marleau
Member

Information

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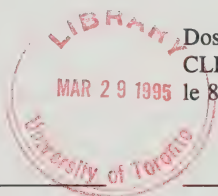
Summary

Letter Carriers Union of Canada, *complainant*, Canada Post Corporation, *respondent*, and Canadian Union of Postal Workers, *intervenor*.

Résumé

Union des facteurs du Canada, *plaignant*, Société canadienne des postes, *intimée*, et Syndicat des postiers du Canada, *intervenant*.

Board File: 745-4952
CLR/CCRT Decision no. 1110
March 8, 1995



Dossier du Conseil: 745-4952
CLR/CCRT Décision n° 1110
le 8 mars 1995

The Letter Carriers Union of Canada (LCUC) filed a complaint alleging that the Canada Post Corporation (the employer) had violated section 94(1)(a) of the Canada Labour Code by refusing to grant access to employees from other than their own work locations. The employees wanted to canvass co-workers at other CPC premises during non-working hours and within designated lunch areas. The employees were part of LCUC's raiding campaign to replace the Canadian Union of Postal Workers (CUPW) as bargaining agent for the operational bargaining unit.

CPC took the position that solicitation on the employer's premises would be allowed only if it was carried out by employees employed at the worksite, outside the business hours and in non-working areas. The employer was of the view that excluding access by employees from other locations or non-employees did not unlawfully restrict organizing activity at the work place. Moreover, given the nature of its operations, CPC alleged that there were valid business and security reasons for its position.

L'Union des facteurs du Canada (UFC) a déposé une plainte alléguant que la Société canadienne des postes (l'employeur) avait enfreint l'alinéa 94(1)a) du Code canadien du travail lorsqu'elle a refusé à ses employés l'accès à des installations autres que leur lieu habituel de travail, pendant les heures libres et dans les aires de repos, afin de solliciter l'adhésion de leurs collègues. Les employés désiraient appuyer la campagne de maraudage de l'UFC visant à remplacer le Syndicat des postiers du Canada (SPC) à titre d'agent négociateur de l'unité de négociation constituée du personnel d'exploitation.

La position de la Société était que la sollicitation ne serait permise sur sa propriété que si elle se faisait par des employés travaillant sur les lieux, en dehors des heures de travail et dans les aires non réservées au travail. L'employeur était d'avis qu'interdire l'accès à des employés travaillant ailleurs ou à des personnes autres que des employés ne constituait pas une ingérence illégale dans les activités de syndicalisation au lieu de travail. De plus, étant donné la nature de son exploitation, la Société a allégué que de

sérieux motifs d'ordre commercial et sécuritaire justifiaient sa position.

The employer also relied on its obligation to act in a neutral manner when two unions are competing to represent a group of its employees.

L'employeur a également invoqué son obligation de rester neutre lorsque deux syndicats se disputent le droit de représenter un groupe de ses employés.

The Board reviewed its interpretation and that of other labour relations tribunals in Canada, of section 95(d) of the Code. This section regulates the time frame within which membership solicitation can take place on the employer's premises. The Board decided that solicitation on the employer's premises, during non-working hours in non-working areas is not prohibited by the Code when it is carried out by those directly affected in collectively choosing a bargaining agent, whose main task will be to negotiate the terms and conditions of employment of the group of employees included in the bargaining unit. The Board found that to conclude otherwise would unduly restrict the means of exercising the right of association set out in section 8 of the Code as well as the scope of the protection provided by section 94 of the Code.

Le Conseil a revu son interprétation, ainsi que celle d'autres conseils de relations de travail au Canada, de l'alinéa 95d) du Code. Cette disposition régit les heures au cours desquelles la sollicitation d'adhésions peut se faire sur la propriété de l'employeur. Le Conseil a jugé que la sollicitation sur la propriété de l'employeur, pendant les heures libres, dans des aires non réservées au travail, n'est pas interdite par le Code lorsqu'elle est faite par les premiers intéressés au choix collectif d'un agent négociateur, dont la tâche principale sera de négocier les conditions de travail du groupe d'employés compris dans l'unité de négociation. Le Conseil estime qu'en arriver à une autre conclusion restreindrait indûment les moyens d'exercer le droit d'association prévu par l'article 8 du Code ainsi que la portée de la protection offerte par l'article 94 du Code.

However, the Board concluded that solicitation must comply with conditions that ensure a balance between the employer's right to productivity and sound management on the one hand, and on the other hand, the employees' right to freely exercise their rights of association. The employer did not point out specific disruptions or adverse effects on its business which could reasonably be anticipated should greater access to its premises be granted as requested by LCUC.

Cependant, le Conseil a conclu que la sollicitation doit se conformer à des conditions qui assurent un équilibre entre le droit de l'employeur à la productivité et à une saine gestion d'une part, et au droit des employés d'exercer librement leur droit d'association d'autre part. L'employeur n'a pas indiqué de façon précise les perturbations ou effets néfastes sur son entreprise qui pourraient être raisonnablement anticipés si un plus grand accès à ses installations était accordé comme le demande l'Union des facteurs.

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The CPC's set of security guidelines can be adapted and followed to ensure that LCUC supporters are identified and monitored when they legally canvass on CPC's premises. Given the evidence, and after having reviewed the jurisprudence concerning the meaning of «compelling and justifiable reasons» that CPC had alleged, the Board concluded that these reasons did not meet the test in the instant case.

The Board allowed the complaint and ordered CPC to grant access to employees in the bargaining unit acting as LCUC representatives for the purposes of canvassing and soliciting union membership during non-working time in non-working areas, subject to CPC's security guidelines applied in light of these reasons.

L'ensemble de lignes directrices établies par la Société peuvent être adaptées et suivies afin d'assurer que les personnes qui appuient l'Union des facteurs sont identifiées et font l'objet d'un contrôle lorsqu'elles sollicitent sur la propriété de la Société. Devant la preuve et après avoir revu la jurisprudence concernant la signification des «motifs impérieux et justifiables» allégués par la Société, le Conseil conclut que ces raisons ne satisfont pas aux critères dans la présente affaire.

Le Conseil accueille la plainte et ordonne à la Société d'accorder l'accès aux employés de l'unité de négociation agissant à titre de représentants de l'Union des facteurs aux fins de sollicitation d'adhésions syndicales pendant les heures libres et dans les aires non réservées au travail, conformément aux lignes directrices en matière de sécurité émises par la Société et appliquées dans le sens des présents motifs.

Reasons for decision

Letter Carriers Union of Canada,

complainant,

and

Canada Post Corporation,

respondent,

and

Canadian Union of Postal Workers,

intervenor.

Board File: 745-4952

CLRB/CCRT Decision no. 1110

March 8, 1995

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Mr. Calvin B. Davis and Ms. Sarah E. FitzGerald, Members. A hearing was held on January 2 and 3, 1995, at Ottawa.

Appearances

Mr. Dougald E. Brown, for the complainant;

Mr. John West, accompanied by Mr. André Sauriol, for the respondent; and

Mr. Thomas A. McDougall, Q.C., assisted by Mr. R. Aaron Rubinoff and accompanied by Mr. Dale Clark, for the intervenor.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

On November 24, 1994, the Letter Carriers Union of Canada (LCUC) filed a complaint with the Board alleging that Canada Post Corporation (CPC or the Corporation) had violated sections 94(1)(a) and 94(3)(a)(i) of the Canada Labour Code.

These sections read as follows:

"94. (1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

...

(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union, ..."

At the outset of the hearing, LCUC withdrew its allegation that section 94(3)(a)(i) of the Code had been violated. It also withdrew a second complaint dealing with a posting issue.

LCUC alleged that the Corporation contravened the Code by refusing to grant access to employees from other than their own work locations. The employees wanted to canvass co-workers at other CPC premises during non-working hours and within designated lunch areas. The employees were part of LCUC's raiding campaign to replace the Canadian Union of Postal Workers (CUPW) as bargaining agent for the operational bargaining unit. LCUC says the employer had no compelling business reasons or justification to prohibit access at any location to its employees who were not scheduled for work at their own premises. The decision, LCUC says, was aimed at prohibiting the solicitation of employees. In the result, CPC reduced the status of its employees to that of any "stranger" to the Corporation.

The complainant asked the Board to declare that CPC violated the Code by interfering with the organization and formation of a trade union. LCUC also asked the Board to order the Corporation to grant LCUC representatives, who are its employees, access to designated lunch areas, in order to canvass during rest periods and lunch breaks at any of CPC's worksites. LCUC agrees that if membership solicitation takes place on CPC's premises, it should only be carried out in the cafeterias or lunch areas during non-working hours.

The employer's position can be summarized as follows. Firstly, solicitation on the employer's premises would be allowed if it was carried out by employees employed at the worksite, outside of business hours and in non-working areas. Thus, the October 21st, 1994 memorandum signed by Mr. G. Courville, Corporate Manager, Labour Relations, stating that position, which excludes access by employees from other locations or non employees, did not unlawfully restrict organizing activity at the work place. This position reflects the employer's general policy restricting employee access to CPC facilities for any purpose other than to carry out their work, unless prior permission is obtained. Given the nature of CPC's operations, there are valid business and security reasons for this policy. The employer's main concern is security,

either at the point of access, as for example in smaller postal stations and depots, or in larger plants, once the person has gone through the security check point.

Secondly, the employer relies on its obligation to act in a strictly neutral manner when two unions are competing to represent a group of its employees, as in the present case.

The employer considered that granting access to its facilities for organizing purposes, when such access is normally prohibited for other purposes, could be seen as favouring LCUC. CPC referred to a letter dated June 9, 1994 on that subject, from Mr. D.W. Tingley, CUPW's National President, requesting that the employer remain neutral vis-à-vis LCUC's efforts to displace CUPW as the certified bargaining agent for the operational unit. One of the contentious issues cited by Mr. Tingley in that letter was allowing LCUC canvassers access to CPC premises.

CUPW asked the Board to grant it intervenor status on the basis that it is the incumbent bargaining agent representing the group of employees the applicant seeks to represent. CUPW took the position that allowing LCUC's supporters to have access to CPC's premises would constitute favouritism on the part of the employer, and would therefore be a violation of the Code. CUPW also submitted that the employer was not only correct in denying LCUC supporters access to those locations where they did not work, but also that they should be denied access to their own worksites if they were on leave or not scheduled to work. The Board granted intervenor status to CUPW.

II

At the conclusion of the hearing, the Board orally rendered an interim decision pursuant to section 20(1) of the Code in which it allowed the instant complaint and ordered the employer to grant access as requested by LCUC, subject to security

guidelines as defined in the Order. The Board also notified the parties that access granted to LCUC also applied to employees acting as CUPW representatives during the current raiding campaign.

These are the reasons for that decision.

III

The present complaint is the second unfair labour practice complaint pursuant to section 94 of the Code that LCUC has filed with the Board over the past three months.

In the first complaint filed on September 27, 1994, LCUC alleged that the Corporation had violated sections 94(1)(a) and 94(3)(a)(i) of the Code. The issue was the employer's refusal to grant leave without pay to employees who were LCUC supporters and who wanted to use the leave without pay provisions of the collective agreement to encourage other employees to join LCUC as had been done during the 1991 LCUC/IBEW raiding campaign. The practice continued in the 1994-1995 campaign until July 1994, when the employer refused to grant any further leave without pay for this purpose.

On December 9, 1994, in Canada Post Corporation (1994), as yet unreported CLRB decision no. 1095, the Board found that CPC had violated section 94(1)(a) of the Code. The Board considered that:

"... the employer's change in the interpretation and the application of the collective agreement in the context and the circumstances of this case interferes with the formation of a trade union, insofar as LCUC's supporters were denied leave without pay that had in the past, been granted pursuant to the collective agreement for the same reasons. The employer's decision in fact deprives the employees who

have chosen to support LCUC of one of the contractual mechanisms previously used with respect to their freedom of association.

This decision turns on the fact of the employer's departure from an established interpretation and application of existing collective agreement wording and accordingly, is narrow in its scope. By choosing to depart from this interpretation and application of the collective agreement, uncontested until now, the employer breached its obligation to remain neutral, interfered with the formation of a trade union and thus violated section 94(1)(a) of the Code."

(pages 14-15)

The Board dismissed that part of the complaint alleging a violation of section 94(3)(a)(i), since the complainant did not establish that CPC intended to discriminate against LCUC supporters because of exercising their right of association provided for in the Code.

In the above mentioned decision, the Board reviewed the relevant facts, and addressed the interpretation and application of the Code with respect to the meaning of the following expressions: "formation of a trade union", "interference by an employer in the organization and formation of a trade union", and "neutrality" imposed on an employer faced with an organizing drive. Since the present complaint raises the same facts and issues of interpretation, the Board will not repeat all the facts and issues again in detail, but will refer to its previous decision, whenever it is relevant, in order to deal with this complaint

IV

It is not disputed that CPC's directive, restricting membership solicitation for LCUC in this raiding campaign, was in fact implemented. Solicitation could only be carried out on the employer's premises during non-working hours by employees employed at that worksite. That was not the situation that prevailed during the 1991 IBEW/LCUC

raiding campaign. At that time, access was not denied to CUPW or IBEW/LCUC representatives from other work locations. However, it was subject to guidelines issued by the employer in May 1991. To obtain access to CPC's premises, union representatives had to comply with operational constraints. That is, they were required to provide proper identification and were restricted to the cafeterias and lunch areas, during breaks and lunch periods.

Mr. Bill Boyd, a letter carrier and LCUC supporter, testified that the employer had issued special identification cards in the 1991 campaign, and that no problems occurred as a result of providing access to union representatives. He also contended that, since most letter carriers have some form of CPC identification, this should be adequate for security purposes. Further, Mr. Boyd relied on LCUC's instructions for signing cards, issued as a LCUC Special Bulletin for the 1995 campaign, as reassurance that LCUC canvassers would not behave improperly or irresponsibly while canvassing.

The employer's greatest concern is the question of security, given the nature and magnitude of CPC's operations. The Corporation has approximately 52 000 employees who work in 21 mechanized facilities and 400 depots or postal stations. It moves about 30 to 35 million pieces of mail per day, excluding advertisements. Mr. Alan Whitson, Manager, Loss Prevention and Special Projects, stated that not all employees have identification cards. Only certain letter carriers have identification cards, as the Corporation stopped issuing such cards to external workers some time ago. The identification cards that employees do have only give them access to the plant where they normally work, and this has been the practice for several years.

The Corporation's plant security guidelines, in effect since 1989, define non-employees and employees from other plants as "visitors". According to these guidelines, visitors must sign in, visibly display an ID card, and be escorted by an employee, whereas employees carry their CPC identification card at all times. Drivers

of any vehicles entering the plants, must stay in certain areas and only use certain entrances and exits.

These guidelines differ from the access rules issued by the employer during the 1991 raiding campaign. Mr. Whitson stated that his department would have been opposed to granting access to IBEW/LCUC canvassers from other work locations during the 1991 raiding period but had never been consulted. He said his department was consulted during the current raid campaign and advised against giving access to employees from other plants, or to employees at their own location of employment if they were not scheduled to work.

At postal stations and depots, security rules are different since occasionally, there are no managers on duty. Visitors to any of these facilities will be questioned as to the purpose of their visit when they enter. Here as well, once visitors are inside, it is unlikely that they would be challenged.

In Mr. Whitson's view, the security of a facility is essential since once CPC has given visitors access to its premises, they are rarely stopped. Despite the fact that visitors should remain where they have business, once they pass the security point, they can virtually circulate as they wish, unless challenged by someone in the plant. Even if this rarely occurs, in Mr. Whitson's experience, there is little control over visitors, and breaches of security can lead to loss of customers and CPC products.

Mr Whitson referred to Mr. Courville's memoranda of October 21, 1994 and December 13, 1994 (the latter having been issued after the December 9, 1994 Board decision) that stated:

"... In the event that employees from other locations or non-employees request access, it is to be denied."

and said he had not been consulted with respect to these letters.

He agreed that the above stated directives restricted access to a greater extent than the general security guidelines which were in effect since 1989. Under the 1989 guidelines, visitors are not "denied" access to CPC's premises, but are asked to sign in, are given a visitor's card and are escorted to their place of business in the facility.

Mr. Whitson was not aware of any disruptions or adverse effects caused by the presence of employees from other locations during the 1991 raiding campaign.

Mr. Dale Clark, First National Vice-President, testified at CUPW's request. CUPW maintained that granting LCUC supporters access to CPC's premises would amount to assisting the LCUC raid. Access given to LCUC canvassers should be restricted to employees at their own work locations, to neutral areas, outside of business hour; and no access should be granted to any employees on leave or not scheduled to work. He said that if extensive access was given to LCUC canvassers, "there will be major disruption" in the work place.

V

Decision

The issues the Board must decide, since the parties agree that organizing activities would take place in cafeterias and lunch areas during non-working hours, are:

1. Was CPC's refusal to grant access for organizing purposes, to employees employed at any other CPC worksite, a violation of s. 94(1)(a) of the Code?
2. Was CPC's refusal to grant employees access to their own worksite for organizing purposes if the employee was on leave or not scheduled for work, a violation of s. 94(1)(a) of the Code?

To answer these questions, the Board must consider whether the employer has demonstrated any valid and compelling business reasons for restricting access.

Section 8(1) of the Code reads as follows:

"8. (1) Every employee is free to join the trade union of his choice and to participate in its lawful activities."

As the Board stated in Canada Post Corporation (1994), supra, involving the same parties with respect to this raiding campaign:

"The principal means of protection of employee rights under section 8(1) of the Code resides in section 94(1)(a). This section prohibits employers from interfering with the formation or administration of, or representation by, trade unions. As section 8 itself is declaratory, section 94(1)(a) must be read liberally and with a remedial eye."

(page 8)

Therefore, section 94(1)(a) can be invoked by employees who feel that their lawful attempts to seek union representation are being thwarted by their employer.

Section 94(1)(a) provides union activities with extensive protection. (See Canada Post Corporation (1985), 63 di 136 (CLRB no. 544); and Canadian National Railway Company (1994), 94 CLLC 16,061 (CLRB no. 1081)). The Board has, however, recognized that not all union activities fall under that provision. In Brazeau Transport Inc. (1979), 35 di 163 (CLRB no. 210), the Board said:

"Union activities - whether those of the union's executive, its officer or its members - must be carried out within the framework recognized by the Code. The only union activities that are protected are those which are recognized by the Code. Section 184 [now 94] cannot serve as an umbrella for all union activities regardless of their merits. A union president who speaks on behalf of his

organization's members is clearly taking an action that can always be associated with the performance of union activities. This does not give him free rein to do anything whatsoever at any time because his actions fall within the framework of union activities. To say that it did would force us to recognize anarchy and chaos, which are precisely what the Code seeks to avoid by setting forth rules and a framework within which the said union activities must be carried out."

(pages 166-167; emphasis added)

Section 95(d) of the Code explicitly restricts the exercise of union activities which are protected by section 94(1)(a). It reads as follows:

"95. No trade union or person acting on behalf of a trade union shall

...

(d) except with the consent of the employer of an employee, attempt, at an employee's place of employment during the working hours of the employee, to persuade the employee to become, to refrain from becoming or to cease to be a member of a trade union; ..."

(emphasis added)

This section clearly prohibits union solicitation at the work place during working hours. However, according to the interpretation of this provision by this Board and other relations boards in Canada, section 95(d) does not prohibit organizers from signing up of members in a trade union at the work place, outside working hours. In Bell Canada, August 22, 1975 (LD 19), the Board, considering the scope of sections 8(1) (then 110(1)) and 94(1)(a) (then 184(1)(a)) of the Code, implicitly interpreted section 95(d):

"The Board finds that the crucial issue in the instant case is whether Bell Canada can prevent its employees from soliciting membership

in a trade union and distributing union literature on company premises by making such behaviour subject to disciplinary action, when these activities take place outside the working hours of the employees involved. The Board finds that Bell Canada may not do so without violating the provisions of the Canada Labour Code (Part V [now Part I] - Industrial Relations), and particularly the provisions of Sections 184(1)(a) and 184(3)(b) of the Code.

Section 110(1) of the Canada Labour Code guarantees to employees the right to join the trade union of their choice and 'to participate in its lawful activities'. The basic freedoms thus protected include the right to distribute or otherwise disseminate and receive information about a trade union and its activities and the right to sign a membership card, provided these activities do not take place during the working hours of the employees involved. An employer may not without compelling business reasons, prohibit employees from exercising these rights on company premises. ..."

(page 2; emphasis added)

This approach was reiterated in Ottawa-Carleton Regional Transit Commission (1984), 56 di 203; and 7 CLRBR (NS) 137 (CLRB no. 475).

The Ontario Labour Relations Board, in Adams Mine, Cliffs of Canada Ltd., Manager (1982), 1 CLRBR (NS) 384, defined as follows the words "working hours" found in section 71 of the Labour Relations Act, R.S.O. 1980, c. 228, a provision which has the same object as section 95(d) of the Code:

"... Labour boards have consistently interpreted the phrase 'working hours' to refer only to the period of time during which an employee is required to undertake his duties and responsibilities. Therefore the section does not apply to those periods of time an employee is on company property before shift, during coffee break, during lunch break, or after shift. This is so even if the employee is being paid for such time, otherwise an employer could prevent the exercise of statutory activity by the simple expedient of a money payment. ..."

(page 395)

In the above mentioned decision, the Ontario Board adopted and applied the interpretation provided by this Board in Bell Canada, *supra*, concerning the right to solicit outside working hours - a right that can only be restricted if the employer can demonstrate the existence of "compelling and justifiable business reasons." The Nova Scotia Labour Relations Board, in Michelin Tires (Canada) Limited, [1979] 2 Can LRBR 388, had previously adopted a similar position.

This interpretation of section 95(d), regulating the time frame within which membership solicitation can take place on the employer's premises, is not contested in the present case.

The Board must determine in this case whether employees, who work for an employer operating at several locations, have the right to solicit membership of their co-workers in the same bargaining unit during non-working hours at the company's work locations other than at their own work place. This is the first time that this specific issue is before the Board. Section 95(d) and other sections of the Code do not however define in any way who, acting on behalf of a trade union, has the right to engage or participate in such solicitation.

Both the employer and the intervenor relied on Michelin Tires, *supra*, to argue that the employer was legally entitled to limit the access of employees canvassing for LCUC to their own work place. The Nova Scotia Board followed the findings of this Board in Bell Canada, *supra*, but added that an employer is justified in restricting access for union organizing purposes to those employees who are scheduled to work at a particular location. The reasoning was that an employee who is on vacation, on leave, or who is not scheduled to work, is not welcome at the worksite, because unrestricted access to such employees might cause security or other problems. The Nova Scotia Board stated:

"Like the Canada Labour Relations Board, this Board finds that an employee's right to engage in trade union activities is interfered with unless the employer has compelling business reasons for prohibiting solicitation for membership in or support for a union other than during working hours. In our opinion there is no compelling business reason why Michelin's employees should not be allowed to solicit on behalf of the Union, if they and the employees with whom they are dealing are on their own time. We do not consider the reasons which are in evidence before us for the generality of the no-solicitation rule to constitute 'compelling business reasons'. It goes without saying that Michelin is not required to admit non-employees, or employees not scheduled to work, to its premises, nor does the Trade Union Act license employees to move freely about the plant. The Company has legitimate reasons relating to security and safety for limiting such movement."

(pages 402-403; emphasis added)

An absolute rule of non admittance concerning union organizing applied to employees not scheduled to work, at any time and at any of the employer's worksites, because of apprehended fears related to security and safety, is not compatible with the provisions of the Code, nor with the jurisprudence of some other labour relations boards. Over the years, labour relations boards have shed light on the meaning and scope of the conditions relating to the exercise of the right of association. We must reiterate that nothing in the Code prohibits an employee from encouraging fellow employees to join a trade union on the employer's premises outside working hours. On the other hand, membership solicitation is an integral part of the expression of the fundamental right of freedom of association provided for in the Code and, in this regard, should be allowed and protected. It should only be restricted for compelling and justifiable reasons, including safety and security concerns.

As the Board stated in Canada Post Corporation (1994), supra:

"The purpose of raiding is to displace a certified bargaining agent. The only means to achieve that result is to convince a majority of employees in the bargaining unit to support the raiding union. This

activity of persuading employees to become a member of a union during a raid period is essential, and not only incidental to the formation of a trade union."

(page 12)

Therefore, the Board concludes that such action is not prohibited by the Code, when it is carried out by those directly affected in collectively choosing a bargaining agent whose task will be to negotiate the terms and conditions of employment of the group of employees included in the bargaining unit. The Board finds that to conclude otherwise would unduly restrict the means of exercising the right of association set out in section 8 of the Code as well as the scope of the protection provided by section 94 of the Code.

Nothing in the Code prohibits an employee who is a member of a bargaining unit from engaging in such solicitation. Therefore, the Board finds that the employer, by prohibiting bargaining unit members from other locations from meeting with fellow employees during non-working hours and in non-working locations within CPC premises, such as cafeterias and lunch areas, is prima facie in violation of section 94(1)(a).

Having said this, there is no doubt that solicitation must nevertheless comply with conditions that ensure a balance between an employer's right to productivity and sound management on the one hand, and on the other hand, the employees' right to freely exercise their right of association.

The balancing test between the parties' interests has been developed over the years by labour boards. It was first established in Bell Canada, supra, where it was referred to as the employer's "compelling and justifiable business reasons" to justify that its actions do not amount to interference pursuant to section 94.

In Ottawa-Carleton Regional Transit Commission, *supra*, the Board defined what it considered to be "compelling and justifiable business reasons." In that case, the Board had to determine whether prohibiting employees from wearing union insignia during an organizing campaign constituted interference in union business by the employer.

After having established that:

"The whole issue of employees' rights to wear their trade union insignia must surely turn on the same principles as the solicitation issue. ..."

(pages 218; and 153)

the Board characterized the reasonableness of an employer's decision to restrict union activities in the following manner:

"'Reasonableness' in the context of restricting a lawful union activity such as the wearing of a union insignia during working hours must surely include the ability to show a detrimental effect on entrepreneurial interests such as, negative customer reaction, security, safety or other business considerations. In other words, 'compelling or justifiable business reasons'."

(pages 218; and 153-154)

In Canada Post Corporation (1987), 69 di 91 (CLRB no. 620), the Board defined "compelling and justifiable business reasons" as follows:

"For an employer to establish compelling and justifiable business reasons, it must show that its operations are being disrupted or that other legitimate business interests are being adversely affected."

(page 99; emphasis added)

A useful discussion concerning the balance to be struck and an employer's right to run a business in accordance with the Code is found in Time Air Inc. (1989), 77 di 55; 3 CLRB (2d) 233; and CLLC 16,015 (CLRB no. 734). That case involved the employer's refusal to allow the union to use the work-place message distribution system and bulletin boards. The Board stated:

"The existence of broadly protected union rights in the work place does not mean that employers are deprived of the right to run their business in an efficient manner. What it boils down to is a duty to run a business in a manner consistent with the Act. ...

An employer who would issue blanket prohibitions against union solicitation outside working hours is likely to contravene the Act."

(pages 63; 241; and 14,136)

The Board, in that case, found useful the principles developed in Ottawa-Carleton Regional Transit Commission, *supra*, and stated:

"On the issue of the employer's ability to intervene in union activities at the work place, this Board reiterated the following in 1984:

'... It seems to us that the "only with compelling and justifiable business reasons" restriction against employer prohibition of the lawful right of employees to solicit membership in the trade union of their choice amongst fellow employees, even if that right is exercised on the employer's premises during non-working hours, best strikes that delicate balance between the competing interests of the employees and an employer's managerial and entrepreneurial interests."

(pages 64; 242; and 14,136-14,137)

In Adams Mine, supra, the Ontario Board recognized, as this Board and the Nova Scotia Board did, the right of employees to solicit membership from other employees on the employer's premises outside working hours. The Ontario Board expressed its concerns on the issue of protection of the employer's rights as follows:

"... This, of course, does not mean an employer is deprived by the Act of maintaining productivity or discipline or of securing his property from encroachment by strangers with whom he has no relationship."

(page 394; emphasis added)

The meaning and scope of this statement has to be addressed in the present case, since CPC claimed that it had no relationship with employees who intended to solicit membership elsewhere than at their own worksite. For the Board to accept the employer's argument that those employees seeking access to CPC locations for the purpose of promoting LCUC are "strangers" because they do not work at or out of that location would restrict them from attempting to speak to their fellow bargaining unit members on this important issue and unduly limit the employees' right under section 8 in the circumstances. There is one nation-wide bargaining unit in existence in this case. The Board would effectively deprive employees of their right to participate in the formation of the trade union of their choice if it accepted the employer's and intervenor's positions and concluded that an employee may only solicit fellow employees at his or her own work location. Consequently, in this case and for the purpose of this decision, it suffices to say that the Board does not consider that employees at one work location are strangers to any other work location such that they can be treated as strangers with whom the employer has no relationship. The Board finds this to be so, when the issue of exercising a section 8 right to choose the collective representative is involved, including signing up other employees in the bargaining unit with whom these employees share a sufficient community of interest

and to which the same collective agreement will apply, whatever the worksite of these employees.

Therefore, the employer must demonstrate that it prohibited the access of certain employees lawfully working toward the formation of LCUC, for "compelling and justifiable business reasons." The employer must also show that any interference with its interests is "real and more than a minor annoyance or inconvenience," as stated by Chairman Adams in Adams Mine, *supra*.

With respect to this issue, the employer explained its general security concerns to justify its policy of restricted access. The Board recognizes that the employer operates a major and crucial public service in Canada. It also recognizes the diversified nature of its operations and its management requirements. However, the employer did not point out any specific disruption or adverse effect on its business which could reasonably be anticipated should greater access to its premises be granted as requested by LCUC.

CPC has established a complete set of security guidelines that can be adapted and followed to ensure that LCUC supporters are identified and monitored when they legally canvass on CPC's premises. Given the evidence on this subject, the Board found that the employer had no justification for restricting access to its premises, as it did, in the circumstances of this case.

The employer expressed its intent to remain neutral before and during the 1995 raiding campaign. However, the access restrictions in this case cannot be justified on this ground. Employees wishing to speak to their colleagues in the bargaining unit for lawful purposes, can do so under the Code if carried out in conformity with reasonable security rules. CPC, by restricting the access of LCUC organizers beyond what is acceptable in virtue of the "compelling business reasons test", departed from its neutral stance.


VI

For these reasons, given the circumstances of the case and the objectives of the Code, the Board has found that CPC's decision to restrict the access of employees acting as LCUC representatives to their own place of work, when scheduled for work, is a violation of the Code. The Board was not satisfied that the reasons given by CPC amounted to compelling and justifiable business reasons.

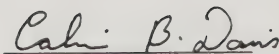
Consequently, the Board orally issued this order at the hearing:

"Canada Post shall grant access to employees in the bargaining unit acting as LCUC representatives for the purposes of canvassing and soliciting union membership during employee rest breaks and lunch periods in the cafeterias and/or lunch areas only. Such access will be subject to CPC security guidelines currently in effect, to the extent they apply in light of this order."

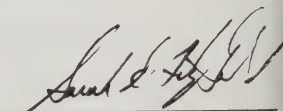
At the hearing, the Board reserved the right to deal with any question arising in connection with the implementation of this decision, including making a specific order if required. The Board further appointed Mr. Pierre Lajeunesse, Senior Labour Relations Officer of the Ottawa office, to assist the parties, if requested, in implementing this decision.



Louise Doyon
Vice-Chair



Calvin B. Davis
Member



Sarah E. FitzGerald
Member

information

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Summary

National Association of Broadcast Employees and Technicians - CLC, *complainant*, and CFTO-TV Limited, *respondent*.

Board File: 745-4571

CLRB/CCRT Decision no. 1111
March 17, 1995

Résumé

Syndicat national des travailleurs et travailleuses en communication - CTC, *plaignant*, et CFTO-TV Limited, *intimée*.

Dossier du Conseil: 745-4571

CLRB/CCRT Décision n° 1111
le 17 mars 1995



This is an unfair labour practice complaint wherein the trade union alleges that the employer breached section 94(1)(a) of the Canada Labour Code (Part I - Industrial Relations) when it refused access to its premises to the national representative of the trade union.

The Board found this complaint to have been made in a timely fashion when it was filed within 90 days of the employer's last refusal of access since the duty imposed by section 94(1)(a) of the Code is of a general public interest and the failure to comply therewith gives rise to continuing offence.

The majority found that, in the particular circumstances of this case, the access requested is a necessary incident of this union's rights which are protected by section 94(1) of the Code, particularly its rights of administration.

The majority also found that this is not a proper case for deferral to arbitration pursuant to section 98 of the Code since no arbitrator or arbitration board could properly deal with

Il s'agit ici d'une plainte de pratique déloyale de travail dans laquelle le syndicat allègue que l'employeur a enfreint l'alinéa 94(1)a du Code canadien du travail (Partie I - Relations du travail) lorsqu'il a interdit au représentant national du syndicat l'accès à ses locaux.

Le Conseil juge que la plainte est recevable parce qu'elle a été déposée dans les 90 jours du dernier refus de l'employeur, et que le devoir imposé par l'alinéa 94(1)a du Code est d'intérêt public général. Tout manquement à ce devoir donne lieu à une infraction continue.

La majorité estime que, dans les circonstances particulières de l'affaire, l'accès demandé est un élément nécessaire des droits du syndicat qui sont protégés par le paragraphe 94(1) du Code, et surtout ses droits de veiller à son administration.

En outre, la majorité estime qu'il ne s'agit pas d'une affaire qui peut être renvoyée à l'arbitrage aux termes de l'article 98 du Code, puisque aucun arbitre ou conseil d'arbitrage

the issue of interference in union administration in question here.

The majority held that the employer had violated section 94(1)(a) of the Code since it had no compelling and justifiable business reasons to refuse the access requested. The Board ordered the employer to refrain from violating section 94(1)(a) and, pursuant to section 99(2), directed it to grant the complainant access to its premises subject to reasonable conditions.

Summary of dissent

The dissenting member is of the view that the Code does not protect the access to the employer's property sought by the union. A union's right to administer its affairs and to represent employees without employer interference does not include a right of access to the employer's premises, and this, by non-employees, during working hours.

The dissenting member views the matter not as one of union rights protected pursuant to section 94(1)(a) of the Code, but rather, as one of interpretation of an article of the collective agreement, since the parties have elected to negotiate a right of access. Thus, the dissenting member would have refused to hear and determine the complaint on the grounds that arbitration was the proper forum for resolving the dispute.

Having so found, the dissenting member finds it unnecessary to deal with the issue of timeliness.

ne peut à juste titre trancher la question d'ingérence dans l'administration d'un syndicat.

La majorité juge que l'employeur a enfreint l'alinéa 94(1)(a) du Code parce qu'il n'avait aucun motif impérieux et légitime sur le plan commercial pour refuser l'accès demandé. Le Conseil ordonne à l'employeur de cesser d'enfreindre l'alinéa 94(1)(a) et, aux termes du paragraphe 99(2), de donner au syndicat l'accès à ses locaux à des conditions raisonnables.

Résumé de l'opinion dissidente

Le membre dissident est d'avis que le Code ne protège pas l'accès aux locaux de l'employeur revendiqué par le syndicat. Le droit d'un syndicat de gérer ses affaires et de représenter les employés sans intervention de l'employeur n'inclut pas un droit d'accès aux locaux de l'employeur et cela, par des non-employés, pendant les heures de travail.

Selon le membre dissident, cette affaire ne porte pas sur les droits d'un syndicat protégés en vertu de l'alinéa 94(1)(a) du Code, mais plutôt sur l'interprétation d'un article de la convention collective puisque les parties ont choisi de négocier un droit d'accès. Par conséquent, le membre dissident aurait refusé d'instruire la plainte au motif que l'arbitrage constituait l'instance compétente pour régler le conflit.

Vu cette conclusion, le membre dissident juge qu'il n'est pas nécessaire de traiter la question portant sur la prescription de la plainte.

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Reasons for decision

National Association of Broadcast Employees
and Technicians - CLC,

complainant,

and

CFTO-TV Limited,

respondent.

Board File: 745-4571
CLRB/CCRT Decision no. 1111
March 17, 1995

The Board consisted of Mr. J. Philippe Morneault, Vice-Chair, and Mr. Robert Cadieux and Ms. Véronique L. Marleau, Members.

Appearances

Mr. Barry Chercover, Counsel for the complainant union;

Mr. Edward T. McDermott, Counsel and Mr. David Bannon, Co-Counsel for the respondent employer.

These reasons for decision of the majority were written by Mr. J. Philippe Morneault, Vice-Chair. The dissenting opinion of Ms. Véronique L. Marleau is appended.

I

This is a complaint filed by the National Association of Broadcast Employees and Technicians (NABET, the union or the complainant) against CFTO-TV Limited (CFTO, the employer or the respondent) alleging violations of sections 94(1)(a), 94(3)(a), 94(3)(b) and 94(3)(e) of the Canada Labour Code (Part I - Industrial Relations).

The complaint was filed after CFTO denied Mr. Bryon Lowe, National Representative of the union, access to its premises.

The employer contested the complaint on its merits. In addition, CFTO alleged that the complaint was untimely, or alternatively that the whole matter be deferred to arbitration pursuant to section 98(3) of the Code.

The provisions of the Code which are applicable and in question are thus as follows:

"Preamble

Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;

And whereas Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;

And whereas the Government of Canada has ratified Convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize and has assumed international reporting responsibilities in this regard;

And whereas the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all...

...

8.(1) Every employee is free to join the trade union of his choice and to participate in its lawful activities.

...

94. (1) *No employer or person acting on behalf of an employer shall*

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or...

...

94. (3) *No employer or person acting on behalf of an employer shall*

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

(ii) has been expelled or suspended from membership in a trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union,

(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(iv) has made or is about to make a disclosure that the person may be required to make in a proceeding under this Part,

(v) has made an application or filed a complaint under this Part, or

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;

(b) impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred on him by this Part;

...

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

(ii) making a disclosure that the person may be required to make in a proceeding under this Part, or

(iii) making an application or filing a complaint under this Part;

...

97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.

98.(3) The Board may refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board.

98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.

...

109.(1) Where the Board receives from a trade union an application for an order granting an authorized representative of the trade union access to employees living in an isolated location on premises owned or controlled by their employer or by any other person, the Board may make an order granting the authorized representative of the trade union designated in the order access to the employees on the

premises of their employer or such other person, as the case may be, that are designated in the order if the Board determines that access to the employees

(a) would be impracticable unless permitted on premises owned or controlled by their employer or by such other person; and

(b) is reasonably required for purposes relating to soliciting union memberships, the negotiation or administration of a collective agreement, the processing of a grievance or the provision of a union service to employees."

In light of the provisions of section 98(4) which reverse the burden of proof only with respect to that part of the union's complaint made pursuant to sections 94(3)(a), 94(3)(b) and 94(3)(e) of the Code, the parties were asked at the outset of the hearing how they intended to proceed. The union withdrew that part of its complaint made pursuant to section 94(3)(a), (b) and (e) and maintained only that part of it made pursuant to section 94(1)(a) of the Code. This rendered section 98(4) inapplicable and the union thus carried the burden of proof.

II

The facts which gave rise to this matter can be profitably summarized in the following fashion.

The backdrop of the matter is that NABET or its predecessor unions have represented this bargaining unit or predecessor bargaining units at CFTO for something in excess of thirty years. There is a longstanding bargaining relationship between NABET and CFTO. The parties during that period of time have gone through several rounds of negotiations and concluded collective agreements regularly. However, in 1988, during

the course of negotiations, there was a dispute between the parties which resulted in CFTO locking out the employees in the bargaining unit. This dispute has been described by one of the employer's witnesses as a "bitter", "acrimonious", and "hostile" dispute. The lock-out lasted for some three months and when finally settled about 140 of approximately 300 employees at that time accepted a severance package and did not return to work. After the dispute was settled and a new collective agreement was concluded, there remained hard feelings between the parties as a result of this dispute. Prior to the 1988 dispute, the NABET national representative representing this bargaining unit was Mr. Steel. He was replaced for negotiations and during the lock-out by Mr. Foster. As the relationship between Foster and CFTO became strained during the dispute, NABET decided after the new collective agreement was concluded in 1988 to reassign the unit to someone who had not been involved in the dispute. The unit was reassigned to Bryon Lowe who is to this day the current national representative of NABET representing this bargaining unit. The employer was advised that Lowe was appointed in 1989.

NABET is a union which represents typical broadcasting units across Canada. It operates its bargaining relation with employers throughout the country through national representatives who are full-time employees of the union. Local union officers who are employed by the employer usually initiate grievances but from then on the grievances are handled in the name of the union by the national representative who liaises with the local. The evidence disclosed that NABET usually carries out its business by meetings with its members and with employees whenever necessary. Its national representatives have backgrounds in the broadcasting industry and are very conscious of how companies work and that they must not interfere with that work.

The evidence disclosed that NABET never had any problem with disruption of work in making visits to any of the employers where it represents employees. Prior to the 1988 dispute, Steel, who was the then national representative of NABET, had access to CFTO's premises once or twice a month. There is no evidence that any of those

visits disrupted the employer's operations. This access to the employer's premises was never questioned prior to the 1988 dispute by CFTO nor has it ever been questioned at any of the other places where NABET represents employees.

After being appointed the national representative of this unit in 1989, Bryon Lowe advised CFTO that he wanted to visit the premises with his predecessor representative. The employer advised that NABET was not welcome on its premises. Lowe did not believe that the issue should be pursued at that time so that the existing wounds between the parties would heal.

In 1991, the parties renegotiated their collective agreement and did reach an agreement. No modification to the access provisions was made or requested by either party during the negotiations. Following the ratification of the agreement, the chief executive officer of CFTO advised Bryon Lowe that NABET still was not welcome on the premises of CFTO. Brief and periodical discussions of the issue with other management personnel thereafter produced the same response, so that, from 1988 to the present, the NABET national representative has not had access to CFTO's premises.

Towards the end of 1992, the union decided that it would no longer continue to have a half relation with its CFTO unit and initiated a correspondence with the employer requesting access to the employer's premises. Thus, on March 1, 1993, the union addressed the following letter to the employer,

"BY FAX AND MAIL

Mr. George Plotkin
Manager - Employee Relations
CFTO-TV Limited
Box 9, Station "O"
Toronto, Ontario
M4A 2N9

Dear George:

In accordance with Article 4.3, please be advised that in the morning of Monday, March 8, 1993, I, as Union Representative wish to visit all areas where NABET/CFTO employees are working on the Company's premises at Channel Nine Court.

I would assume that the previously issued CFTO photo identification card #0000602 I still have remains valid. If not, I would appreciate the Company furnishing a new suitable identification that would "entitle admission to the premises of the Company and other places, etc."

Yours very truly,

(signed)

*Bryon J. Lowe
Regional Director"*

which gave rise to the following exchange of communications between the parties.

"2 March 1993

BY FAX & MAIL

*Mr. Byron J. Lowe
Regional Director Nabet
245 Fairview Mall Drive
Suite 414
Willowdale, Ontario
M2J 4T1*

Dear Mr. Lowe,

In reply to your letter dated March 1, 1993 requesting permission to visit the premises at Channel Nine Court on March 8, 1993, before any consideration is given to your request, the Company in accordance with Article 4:3 in the current CFTO-TV NABET

Agreement, requires the specific nature of the inspections or investigations you wish to carry out.

For your information, any previous CFTO-TV identification that might have been issued to you in your name is no longer valid.

Your truly,

(signed)

*George Plotkin
Manager
Employee Relations"*

* * * * *

"March 2, 1993

BY FAX AND MAIL

...

Dear George:

Re: Your Fax of Today's Date

Please be advised that my request to visit the Company's premises is in accordance with Article 4.3 which reads:

"Representatives of the Union shall have access to the Company's premises to carry on inspections or investigations pertaining to the terms and conditions of this Agreement, etc. etc."

This would be the only purpose of my visit.

Yours very truly,

(signed)

*Bryon J. Lowe
Regional Director"*

* * * * *

"4 March 1993

...

Dear Mr. Lowe,

In response to your letter of March 2, 1993 in connection with your intended visit to the premises at 9 Channel 9 Court on Monday March 8, 1993, you have failed to detail the specifics of exactly what you want to "inspect and investigate".

At this time the Company is not aware of any violations to the terms and conditions of the Agreement which necessitates a visit by a Representative of NABET.

The Company, therefore, denies you permission to enter the premises on Monday March 8, 1993. However, if you supply the Company with the details of your visit, the Company will reconsider your request.

Yours truly,

(signed)

*George Plotkin
Manager
Employee Relations"*

* * * * *

"March 9, 1993

...

Dear George:

Re: Your Fax and Letter of March 4, 1993

I did not think that after more than three decades of a collective bargaining relationship between the Company and NABET there would have been any necessity to speak to the purpose of access. Indeed, as far as we are aware, this is only the second occasion in all those years in which the Company has apparently withheld permission for a visit to the premises.

The language of Article 4.3 "Union Access to Premises" is clear and is intended to ensure Representatives of the Union access to places where those Company employees covered by the Collective Agreement are working. Such visits are not for the purpose of soliciting membership or organizing non-Union employees or for any other purpose than to carry on "inspections or investigations pertaining to the terms and conditions of this Agreement". This does not presuppose that the Company is in violation of any particular term or condition, but simply provides for the accredited Representative of the Union to observe the operation first hand.

I do therefore request that the Company observe the clear provisions of Article 4.3 and grant access. I will of course provide reasonable notice of the time frame for any such visit.

I look forward to your earliest response.

Yours truly,

(signed)

Bryon J. Lowe"

* * * * *

"9 March 1993

...

Dear Mr. Lowe,

This letter is in response to your fax of March 9 1993, seeking permission to come to the station to "observe".

During the telephone conversation between Mr. Bassett and yourself of to-day, Mr. Bassett denied you permission to come and "observe". Mr. Bassett reiterated that Article 4:3 refers only to "inspections and investigations" and you have not informed the Company what you intend to inspect or investigate.

Mr. Bassett told you to re-submit your request for permission to visit the station, if you still feel it necessary, following the General

Meeting of March 16, 1993 with your members. However, you are still obliged to advise the Company what you intend to inspect or investigate, before permission will be granted.

As I will be away on vacation from March 17, 1993 until April 19, 1993, would you please address any further correspondence between NABET and the Company, to the attention of Mr. J.J. Garwood.

Yours truly,

(signed)

George Plotkin"

* * * * *

"March 9, 1993

Mr. George Plotkin

Dear George:

For the record, I would note that my actual written request of March 9, 1993 stated that the purpose was to "Carry on inspections or investigations pertaining to the terms and conditions of this Agreement". I believe that this applies to all terms and conditions of the Collective Agreement. I did note that Mr. Bassett suggested that if I still wish to visit following the March 16th General Membership Meeting, I should re-submit my request at that time.

I note that as you will be away, I will address such to the attention of J.J. Garwood.

Yours very truly,

(signed)

Bryon J. Lowe"

* * * * *

"March 17, 1993

*Mr. Joe Garwood
Executive Vice-President and
Chief Operating Officer
CFTO-TV Limited
Box 9, Station "O"
Toronto, Ontario
M4A 2M9*

Dear Joe:

Re: Article 4.3

As per George Plotkin's advice, I am addressing this to you in his absence.

As you know, Mr. Bassett had suggested that if I still wished to visit the premises following our General Meeting, I should resubmit my request.

Those who did brave the elements to attend the meeting were insistant [sic] in having me pursue the question of access, and they believe it to be an important part of the relationship. They understand, of course, that such access is not for social or organizing reasons, but for carrying on inspections or investigations pertaining to the terms and conditions of the Agreement.

I would like to make such an inspection on the morning of March 23, 1993.

Yours truly,

(signed)

Bryon J. Lowe"

* * * * *

"March 18, 1993

...

Dear Bryon:

Re: Article 4.3

Thank you for your letter of March 17, 1993 concerning the issue of access. However, I must re-iterate the company's position that Article 4.3 provides for access to representatives of the union to carry on inspection or investigation pertaining to the terms and conditions of the Collective Agreement between CFTO-TV Limited and N.A.B.E.T.

It is not as you state that your membership feels "it to be an important part of the relationship". Failing exact and specific details of what it is that you intend to inspect or investigate, the company is not prepared to accede to your request.

Yours truly,

(signed)

J.J. Garwood"

* * * * *

"April 5, 1993

...

Dear Joe:

I would again put forward my request of access to the workplace of the members of the CFTO-TV Bargaining Unit.

I must say that I am somewhat at a lost to understand why after more than twenty-seven years of unfettered access by NABET Representatives the Company seems today to wish to deny access. I would point out that it was my understanding when I took over the servicing of the CFTO-TV Bargaining Unit that with the signed settlement of the 1988 dispute, the Parties had agreed to withdraw from any action against each other arising from the dispute.

As I attempted to make clear in my previous correspondence, my request to visit the premises is solely for the purpose of fulfilling my duties as a Representative of the duly certified Bargaining Agent under the Code to carry on inspection or investigation to determine if provisions of the Collective Agreement are being complied with.

It would be my view that a refusal for such access would constitute interference with my ability to represent the members of the NABET Bargaining Unit, contrary to 94(1)(a) of the Code.

Again, I do want to re-emphasize that such access is in fact nothing more than what was the normal and routine practice for the recognized Representative of NABET for all the years since it first became the Bargaining Agent, and is of course no different from access that is readily available at all other Broadcast Operations throughout the Region.

I would appreciate your response in order that we may set a specific date and time for such access, if that is your wish.

Yours very truly,

(signed)

Bryon J. Lowe"

* * * * *

"April 8, 1993

...

Dear Mr. Lowe

I am in receipt of a copy of your letter of April 5, 1993 addressed to Mr. Joe Garwood and have been asked to reply.

As you may be aware, I am General Counsel to CFTO-TV Limited. Please be advised that CFTO-TV is at all times knowledgeable of and intends to comply with the terms and conditions of the Collective Agreement as we expect the Union to do.

In order to clarify our position once and for all, regarding the access issue, it is our interpretation of Article 4.3 of the Collective Agreement between CFTO-TV Limited and the National Association of Broadcast Employees & Technicians (NABET) that Union representatives may only have access to the Company's premises for the purposes of "carrying on inspections or investigations pertaining to the terms and conditions of the Agreement."

We are accordingly of the view that the Union's right to enter the Company's premises must be for a certain purpose which pertains to the terms and conditions of the Agreement. You have already indicated in your previous correspondence of March 9, 1993 that you have no intention of soliciting membership or organizing non-Union employees or accessing the Company's facilities for any other purpose. If this is your position, we find it difficult to understand why you are unwilling to provide us with reasonable notice outlining the purpose of your visit.

For the record, we have no intention of interfering with your ability to represent the members of the CFTO-TV Bargaining Unit. In accordance with the Collective Agreement, an infrastructure is established whereby the Union has the ability to communicate with the CFTO-TV Bargaining Unit by providing Company employees with notice of Union meetings and other functions on the Company's bulletin board (Article 4.4). Any concerns or complaints regarding the agreement can be reviewed with Union stewards and a grievance procedure is provided for in Article 6 of the Agreement. If you have any specific concerns of non-compliance, please advise and the usual steps will be followed pursuant to the Agreement. In addition, the Union has the ability to meet with Company employees off Company premises after work hours at any time.

As we have previously indicated, please provide us with specific details as to what you plan to inspect or investigate, so that we may reconsider your request for access. It is necessary that we satisfy ourselves that the purpose of your inspection or investigation is related to the terms and conditions of the Collective Agreement in accord with the letter and spirit of Article 4.3.

Yours very truly,

(signed)

Grace B. Shafran"

* * * * *

"June 16, 1993

*Ms. Grace B. Shafran
Vice-President and General Counsel*

*CFTO-TV Limited
Box 9, Station "O"
Toronto, Ontario
M4A 2M9*

Dear Ms. Shafran:

NABET represents employees in numerous bargaining units across Ontario and Canada. In each location NABET staff representatives attend at the employer premises on a regular basis to fulfill NABET's right and duty to represent employees in the bargaining unit. By the 1990's, such access to employer premises reflects one of the fundamental ways in which the Union is administered and in which the Union represents employees. NABET has enough experience and integrity that no employer has to be concerned that any work will be disrupted when we attend employer premises on Union business. For my own sake, I personally assure you that my visits to employer premises do not disrupt work.

At the same time, I cannot believe that CFTO's continued refusal to allow me access to the premises is based on any legitimate employer business interest. I have not felt it necessary to be more specific in previous requests for access in part because Article 4.3 of the Collective Agreement is only a partial answer to the issue. I believe that I have a right to access to the company premises under the Canada Labour Code as a NABET representative in the ordinary course of my assignment as a representative of the Union.

On most occasions, I will have no difficulty giving advance notice of my visits, but I object to a process, which in my view, is calculated to interfere or prevent NABET's ordinary operation and its representation of the employees in the bargaining unit at CFTO. So that there will be no misunderstanding, I do not propose to advise of the specifics of each visit although I would always be open concerning any specific visit. I would expect in the ordinary course to visit the premises on an irregular basis.

Because NABET has not been allowed into CFTO since the lockout in 1988 was settled, I would imagine that the resumption of normal visits will require me to fulfill a number of objectives at the outset. When a normal relationship has been re-established, my frequency of visits will no doubt be similar to those of Ken Steel's during the twenty-three years that he served CFTO for NABET.

At this point, I wish to do the following:

- 1) I want to observe the working functions of the Program Researchers and those identified as Associate Producers for the purpose of deciding whether there has been a violation of the Collective Agreement;*
- 2) I wish to inspect the studio production for the Dini Petty Show in connection with an impending grievance;*
- 3) I want to visit all of the work areas to assure that everyone in the bargaining unit is properly represented by shop stewards;*
- 4) I want to visit all of the work areas to determine that health and safety standards are being observed and that all members of the bargaining unit are aware of their rights and obligations in connection with health and safety matters;*
- 5) I plan to visit all areas to give bargaining unit employees an opportunity to voice their concerns or complaints about any and all employment issues;*
- 6) I plan to use my visits to CFTO to assist in maintaining the communications between the Union and all members of the bargaining unit. As you know because of the vagaries of many different shifts, many members are unable to attend Union meetings. We have always found direct communication more meaningful than bulletin boards. During my visits I may also solicit and deliver information both verbally and in writing from and to the employees in the bargaining unit in connection with the operation and administration of the Union and the representation of employees by the Union.*

Your letter of April 8, 1993, implies that NABET's right to enter the company's premises is restricted to the rights set out in Article 4.3 of the Collective Agreement. We take the position that you are using the Collective Agreement to commit an unfair labour practice by interfering with NABET's operation and the representation of the employees in the bargaining unit contrary to the Canada Labour Code.

I have been on vacation or would have replied to your letter before now. At this point, I would suggest that my first visit to CFTO be scheduled for one of the following times:

Morning of June 25th

June 29 or 30th

Any day during the weeks of July 5th and July 12th.

I have provided sufficient options that I cannot believe that one of my suggested times cannot be agreed. If I am wrong, please do not hesitate to contact me by telephone to suggest an alternative time for my attendance at CFTO. If no time can be arranged for my attendance to fulfill my functions as NABET representative, I will have no choice but to file an unfair labour practice complaint pursuant to the Canada Labour Code against CFTO. I would appreciate hearing from you in this matter as soon as possible.

Yours truly,

(signed)

Bryon J. Lowe"

* * * * *

"July 5, 1993

...

Dear Sir:

I am in receipt of your letter dated June 16, 1993, and am writing to respond to same.

You have indicated that as a union representative, you believe that you have a right of access to the company premises under the Canada Labour Code. It is our position that the Code provides no such right of access. While employees are entitled to a qualified right to conduct legitimate union activities on company premises, during non-working hours, this right does not extend to a right of access for non-employee union representatives. In addition, employers are not required to permit union activities during work hours, particularly where such activities would interfere with the company's legitimate business interests.

The Canada Labour Board has very clearly indicated that an employer is entitled to restrict union activities, whether during work or non-working hours, where such activities would impede the employer's legitimate business interests. The right of employees to engage in union activity on the company premises is not absolute.

It is our position that as an employer, we are entitled within the limits of the law to restrict union activities on our premises, particularly during working hours and that, in doing so, we are entitled to regulate access to premises by non-employee union representatives. As stated in my earlier letter, we are of the view that NABET is able to communicate with employees and to represent them fully through the established workplace infrastructure. The regulation of access to the company premises by NABET representatives does not interfere with the administration of the union or the representation of employees by NABET.

We would note that you have requested access to the premises during working hours for the purposes of observing employees in the conduct of their employment and that you propose to meet with employees for the purposes of discussing their concerns and maintaining communication with the Union. In our opinion, such activities would clearly interfere with our normal operations and do not fall within the parameters of "inspections or investigations pertaining to the terms and conditions of the Agreement".

In addition, while we recognize the legitimacy of access to the premises for the purposes set forth in Article 4.3 of the collective agreement, we are of the view that the parties have agreed that access, where permitted, is to be carried out at "reasonable hours" and in such a manner as not to interfere with the normal operations of the Company. Your request is therefore not in compliance with the terms and conditions of Article 4.3.

We do not propose to prohibit access in respect of the purposes set out in Article 4.3 and we will, at all times, comply with the terms and conditions contained in that provision. However, in our assessment, the purposes outlined in your letter do not comply with Article 4.3 and access is thereby denied.

Yours very truly,

*(signed)
Grace B. Shafran"*

The evidence disclosed that NABET never had to provide reasons for its visits to the employer's premises prior to the 1988 dispute. Visits were permitted at CFTO in the same manner as at other employers' premises where NABET represents employees. The union's evidence showed that its visits on employer premises with respect to its bargaining units are not necessarily for collective bargaining matters but are also for internal union affairs and to provide its members access to union information. It considers that in servicing union members there are matters other than collective agreement matters, such as, internal union management and internal union affairs that have to be discussed with its members. At all other locations where the union represents employees, it discusses these non-collective agreement matters with its members on its visits to employer premises. The union calls this small "p" political union issues such as mergers and internal union affairs. Prior to the 1988 dispute, NABET had access to the CFTO premises, like elsewhere, to successfully carry out all these activities. The union views this kind of access as an enhancement of the union with the bargaining unit members.

As a result of the aforesaid correspondence, the union became convinced that all access was being denied to the CFTO premises and not only access for collective agreement matters. The union felt that this constituted employer interference with the operation of the union given that its refusal of access to the workplace was absolute.

The union made this complaint on July 21, 1993, since, in its view, it had no practical means of access to its members, and since it wanted to deal with CFTO in the same way as it deals with other employers in the country. The union never filed a grievance contesting the lack of access to the employer's premises nor did it make any application to this Board pursuant to section 109 of the Code.

The evidence for the union disclosed that since the 1988 dispute there has not been a complete steward roster at CFTO. There have only been four stewards on the roster

whereas prior to the dispute it was common for the union to have about ten stewards at any given time. Furthermore, the union representatives on the safety committee have been appointed by the employer since the union has found it impossible for it to name them.

Article 4.3 of the Collective Agreement between the parties which is entitled "Union Access to Premises" reads as follows:

"4.3 Union Access to Premises - Representatives of the Union shall have access to the Company's premises to carry on inspections or investigations pertaining to the terms and conditions of this Agreement at any operating unit of the Company, at reasonable notice to the Company, and free from unreasonable interference from the Company. Such investigation or inspection shall be carried on at reasonable hours and in such manner as not to interfere with the normal operations of the Company. The Company will furnish suitable identification for the representative entitling admission to the premises of the Company and other places where employees covered by this Agreement may be working."

The evidence disclosed that the same language concerning the right of access is found in most of the collective agreements that NABET negotiates in Canada. The evidence showed that CFTO's operations have changed from the way it was prior to the lockout and the downsizing to the present time. There are now fewer employees, fewer shifts and different programming. The employer believes that if the national representative of the union is permitted access, it would disrupt its operations and consequently such activity will not be permitted.

The witnesses who testified on behalf of the employer admitted that they themselves had no authority to grant NABET access to CFTO's premises and it was made clear that only the chief executive officer can give such access. CFTO permits posting and does post union notices at the union's request with the exception of some instances

where it refused to post union documents which criticized the company. There are currently approximately 220 employees working on the premises of CFTO. CFTO admits that if NABET had access to the premises it would be in a better position to represent the unit; however it believes that the representation can be effected without access.

III

It is not necessary to repeat in detail the lengthy submissions of both learned counsel. The arguments presented by counsel for both parties however, were thoroughly researched and very ably delivered. To paraphrase their positions, NABET asks how it can represent the employees in the bargaining unit without having access to them. It sees this as impossible. It repeats that this is the only unit in the broadcasting industry in Canada where access is denied. It argues that access to its members on employers' premises is how this particular union represents employees and carries out its business. It submits that the employer never complained about any disruption of the workplace before and that that suggests there is no such disruption. By virtue of section 94(1)(a) of the Code, it submits the employer has to let the bargaining agent carry on its business as it deems fit. It suggests that the right of access is a necessary incident to the right of representation of employees. The union also submits that in its view the right of access is broader under the provisions of section 94(1)(a) of the Code than simply its right of access to this employer's premises by virtue of Article 4.3 of the Collective Agreement. Even if no specific statutory right of access is created under the Code, it submits that in this instance access is the only proper remedy where a denial of access violates section 94(1)(a) of the Code. It asks the Board to balance the legitimate interests of the union and of the employer and to find that the employer has breached section 94(1)(a) of the Code. In the union's submission, the mere possibility of disruption does not constitute a sufficient interest for the employer and that it cannot simply rely on its property rights to defeat the

union's legitimate right.

On the timeliness question, the union submits that access was denied on July 5, 1993 and that that denial is a fresh denial. On the question of deferral to arbitration, the union submits that the issue in the case is broader than simply the right of access under the Collective Agreement. It states that even if the union had successfully grieved the question of access, it would still have to come before the Board for an order to have access to talk to the employees about matters which do not fall under the collective agreement. The union mainly relies on the following case law and other authorities: (1) Canada Post Corporation (1988), 74 di 72 (CLRBR no. 693); (2) Canada Post Corporation (1990) 81 di 28; and 12 CLRBR (2d) 117 (CLRBR no. 800); (3) Canada Post Corporation (1989), 79 di 122; and 7 CLRBR (2d) 245 (CLRBR no. 772); (4) CFCN Television (a division of CFCN Communications Limited) (1988), 76 di 8; and 89 CLLC 16,008 (CLRBR no. 719); (5) Canada Post Corporation (1987), 69 di 91 (CLRBR no. 620); (6) Claude H. Foisy, Q.C., Daniel E. Lavery, B.C.L., and Luc Martineau, B.C.L., LL.M., Canada Labour Relations Board Policies and Procedures (Toronto: Butterworths & Co. (Canada) Ltd. 1986); (7) Canadian Broadcasting Corporation (1990), 83 di 102; and 91 CLLC 16,007 (CLRBR no. 839); (8) Time Air Inc. (1989), 77 di 55; 3 CLRBR (2d) 233; and 89 CLLC 16,015 (CLRBR no. 734); (9) Canada Post Corporation (1985), 63 di 136 (CLRBR no. 544); (10) Canadian Broadcasting Corporation (Ciné Le Matou Inc.) (1987), 71 di 12 (CLRBR no. 646); (11) Canadian Imperial Bank of Commerce (North Hills and Victoria Hills Branches) (1979), 34 di 651; [1979] 1 Can LRBR 266; and 80 CLLC 16,001 (CLRBR no. 173).

The employer submits that the Board only has authority to permit access to employer premises to persons who are not employees of an employer pursuant to section 109 of the Code and not otherwise. It submits that if the union cannot come under section 109, then it cannot have access. It stresses the distinctions in the case law between these union members (representatives) who are employees of the employer and those

who are not. It submits that the union here only has an interest in having access to the employer's premises to market the union and characterizes this as a desire to have blanket access to the employer's property.

The employer argues that the conduct of internal union business is not a proper ground on which to base the right of access and submits that, in the circumstances of this case, it cannot be found that the employer's refusal interferes with the right to represent employees. In the employer's submission, the right to represent does not give the right of access. The employer believes that if the union is granted access to the employer's premises in this case, it will solicit and violate the provisions of section 95(d) of the Code.

With respect to the timeliness question, the employer submits that the fact that the union did not press the issue of access between 1988 and 1993 ought to be considered. The employer submits that the union had knowledge well beyond the 90-day period prior to making this complaint that access was denied. It also submits that an estoppel is virtually created during this five-year period by the union's acquiescence to a lack of access.

On the question of deferral to arbitration pursuant to section 98(3) of the Code, the employer argues that this is an appropriate case for such deferral principally because the union should not obtain more from the Canada Labour Relations Board than it can obtain at the bargaining table. Finally, the employer submits that in the event the Board makes an order, it should be restricted to provide some protection to the employer's private property rights. The employer relies on the following case law and other authorities: (1) Section 109 of the Canada Labour Code; (2) Trespass to Property Act, R.S.O. 1990, Chapter T.21; (3) Dome Petroleum Limited et al. (1977), 27 di 653; [1978] 1 Can LRBR 393; and 78 CLLC 16,129 (CLRb no. 112); (4) Dome Petroleum Limited (1980), 41 di 169; and [1980] 3 Can LRBR 570 (CLRb no. 263); (5) Dome Petroleum Ltd. and Canadian Marine Drilling Ltd. (1980), 40 di

150; and [1980] 2 Can LRBR 533 (CLRB no. 252); (6) Ottawa-Carleton Regional Transit Commission (1984), 56 di 203; and 7 CLRBR (NS) 137 (CLRB no. 475); (7) Adams Mine, Cliffs of Canada Ltd., Manager, no. 1214-82-U. (OLRB) 1 CLRBR (NS) 384; (8) Michelin Tires (Canada Limited) [1979] 2 Can LRBR 388 (NSLRB); (9) T. Eaton Co. and RWDSU [1985] OLRB Rep. June 1941 and Cadillac Fairview Corp. v. RWDSW [1989] OLRB Rep. December 1992 (Ont. C.A.); (10) R. v. Peters (1970), 16 D.L.R. (3d) 143 (Ont. C.A.); (11) Harrison v. Carswell (1975), 62 D.L.R. (3d) 68 (S.C.R.); and (12) Ontario Labour Relations Act, ss 11 and 11.1.

IV

We have to clearly determine what is the real issue before the Board. NABET frames the issue as a statutory right of unions to represent employees without interference and that this statutory right gives it the right to run its business as it sees fit and to have access to its members without any interference. CFTO, on the other hand, submits that the Board can only grant access pursuant to the provisions of section 109 of the Canada Labour Code which in its view is a complete code of access to employer premises.

With the utmost respect to both counsel, the Board sees the issue as a much narrower one. What is in question in this case is whether section 94(1)(a) of the Code was violated when CFTO refused access to the national representative of NABET in the circumstances described above.

V

The Board will first deal with the question of whether or not the complaint was made in a timely fashion. The Board's policy with respect to timeliness was established originally in the case of Upper Lakes Shipping Ltd. v. Mike Sheehan et al. [1979]

1 S.C.R. 902 case. According to this policy, it is clear that a complaint filed pursuant to section 97(1) of the Code must follow within the 90-day period prescribed by section 97(2). The approach taken by the Board has depended on whether the timeliness question was raised in the context of the same violation repeated several times or of continuing offenses. Where the purpose of a duty imposed by the Code is of a general public interest, the Board has held that a failure to comply gives rise to a continuing offence. For example, in Air Alliance Inc. (1991), 86 di 13; and 92 CLLC 16,013 (CLRB no. 887), the Board had this to say:

"This being the case, the intent of section 97(2), as regards the timeliness of a complaint, is not to ensure that a party that systematically contravenes the Code can do so with impunity, but rather to prevent repeated proceedings. In this type of case, the time limit does not begin to run until the unlawful conduct has ceased. In the instant case, this would apply to the policy itself."

(pages 22; and 14,093)

In this case the employer asks us to find the complaint untimely because the first refusal of access was in 1989 (or at best on March 1, 1993 when the first request in writing was made).

As the Board stated in Air Alliance, supra

"These rights are permanent by nature, as are the obligations arising from them. The Interpretation Act, R.S.C., 1985, c. I-21, clearly says so:

'Law Always Speaking

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.' "

In the Board's view, the union is not precluded from knocking on the employer's door, so to speak, asking to have access, simply because access has been refused at some time in the past. Each such request, if its refusal can be said to violate the Code, creates a new cause and, in our opinion, the 90-day period prescribed by section 97(2) only starts to run from the last such request.

Furthermore, on the estoppel argument, in order to create an estoppel, NABET's conduct in this case must have actually made the employer believe that NABET would not pursue its strict legal rights and the employer must have changed its position to its detriment based on that. There is no evidence herein to support such a conclusion. Thus, for all these reasons, the Board finds this complaint to have been filed in a timely fashion and consequently rejects the employer's arguments regarding timeliness.

VI

The employer asked the Board to refuse to hear and determine this complaint and defer it to arbitration pursuant to the terms of section 98(3) of the Code. As stated previously, NABET has not filed any grievance in connection with the employer's refusal of access herein, although this by itself would not prevent the Board from refusing to hear and determine a complaint in a proper case.

The criteria which the Board uses to govern the exercise of its discretion under section 98(3) have been established in Bell Canada (1977), 20 di 356; [1978] 1 Can LRBR 1; and 78 CLLC 16,126 (CLRB no. 97) where the Board stated:

"... According to this policy, each complaint of unfair practice is to be treated as a cas d'espèce and in principle, the Board is never to decline jurisdiction. This means that in each unfair practice case, the Board will analyze a series of factors before rendering a

decision on its jurisdiction and on the advisability of exercising the discretionary power mentioned in the preamble of section 188(2) [now 98(3)]. The first factor is naturally the existence of a collective agreement. The second factor is the presence or absence in the collective agreement of concrete provisions concerning anti-union discrimination which may allow recourse of the grievance procedure and ultimately, to arbitration. A third factor is the actual text outlining the grievance procedure, the universality of its application to employees and the possibility of filing a grievance in the event of an alleged violation of an anti-discrimination clause of this nature. A fourth factor is the connection which exists between the grievance procedure and the arbitration procedure itself, that is, the possibility of a given grievance being referred to arbitration. Some collective agreements limit and number in type of disputes that may be referred from the grievance procedure to arbitration. Lastly, the jurisdiction of the arbitrator in the arbitration tribunal must be examined. Some collective agreements limit this jurisdiction or the powers of the arbitrator or the arbitration tribunal in granting remedies or redress. If the indications concerning each and every one of the above factors are positive, then it is more likely that the Board will exercise its discretion pursuant to section 188(2) of the Code."

(page 365; 8; and 375)

These criteria have been refined and expanded in a series of subsequent Board cases (see Bank of Montreal, Devonshire Mall Branch (1982), 51 di 160; and 83 CLLC 16,015 (CLRB no. 404; Loomis Armored Car Service Ltd. et al. (1983), 51 di 185 (CLRB no. 408); Canada Post Corporation (1983), 52 di 106; and 83 CLLC 16,047 (CLRB no. 426); Canada Post Corporation (1989), 76 di 212 (CLRB no. 729); and Canada Post Corporation (800), supra. In Canadian Broadcasting Corporation (839), supra. (the Goldhawk case), the Board stated:

"In addition to the more "technical" criteria for deferring to arbitration, consideration must also be given to the statutory framework of the Code and in the necessity to preserve it. After having considered the matter, we do not find that it would be appropriate to defer the present case to arbitration. Some aspects of this case raise serious statutory issues that could not be properly

or totally addressed in arbitration. For that reason, the motion to differ (sic) to arbitration is denied."

(page 126; and 14,105)

Just as our colleagues in that case found, we also find that some aspects of the instant case raise statutory issues that could not be properly or totally addressed in arbitration and consequently the motion of the employer to defer to arbitration is denied.

VII

1. Section 109

In Dome Petroleum Limited et al. (112), supra, the Board discussed at length the policy and rationale behind section 109 of the Code. The Board stated the following:

"Section 199 [now section 109] represents such a change. It is for us to determine the scope of the circumstances in which property rights must give way to the collective bargaining interests sanctioned in the Code. The rationale for the change is clear. Employees have rights under the Code, but history has shown that those rights are usually and only translated into a meaningful exercise of them when employees are informed of them, the method of exercising them and the benefits to be derived from their exercise. Representatives of established trade unions are the common vehicle for purveying this information. Consequently, union representatives may gain access to employer property if it is necessary to communicate with employees. For employees already represented by a trade union, the union may also gain access to fulfil its responsibility as exclusive bargaining agent, but the right of access is not unfettered and wholly at the choice of the union. Rather the Board is the determiner of when access should be permitted and in this role the Board must exercise a balancing function."

(pages 675-676; 410; and 412)

Since that particular request to access was directed to Dome Petroleum, which owned the ship but was not the employer of the employees concerned by the application, the

Board denied access given the limited scope of then section 199 which did not allow access orders against property of third parties (persons other than the employer).

Following the amendment of section 199(1) which empowered the Board to extend the right of access to premises owned by a person other than an employer, the second application was filed against Dome Petroleum which then argued that any order issued under section 199 (now section 109(2)) should not derogate from an employer's rights under section 185(d) of the Code (section 95(d)).

The Board dismissed that argument on the basis that the practical operation of section 199, in the context of the purpose for which it was enacted, is not to be limited by section 185(d)", and issued an order which gave access to the union to solicit union membership and authorized representatives of the union to meet privately with the employees for two hours during the employees' normal working hours.

That order was set aside by the Federal Court of Appeal, which concluded that the Board had misinterpreted the section of the statute that defined its authority and specified its powers when it relied on section 199 to allow a union representative to solicit on company premises during working hours. In Dome Petroleum Ltd. et al. v. Canadian Merchant Service Guild et al., [1981] 2 F.C. 418, the Court stated:

"In my opinion the Board does not possess under section 199, the authority to authorize a union representative to contravene paragraph 185(d).

Paragraph 185(d) is found under the heading "Unfair Practices". It prohibits a union or a person acting on behalf of a union from soliciting an employee at his place of employment during his working hours. The essence of this provision is merely to prohibit union or persons acting on their behalf from interfering with the work of employees.

Section 199 is of an altogether different nature. It applies when

employees live in an isolated location on premises owned or controlled by their employer or by another person, in the cases where it would be impractical for union representatives to have access to the employees elsewhere than on the premises owned or controlled by their employer or by such other person. In those circumstances, the Board may make an order authorizing the union representative to meet the employees on the premises of their employer or such other person. That provision does not, either expressly or impliedly, empower the Board to authorize a representative of a union to interfere with the work of employees; it merely authorizes the Board to authorize a union representative to go and meet the employees on the premises where they live."

(pages 421-422; emphasis added)

From these cases it can readily be seen that section 109 of the Code is specifically directed to the situation where employees live in an isolated location on premises owned or controlled by their employer or by another person and not to places of work per se.

In neither of the above two cases was the interaction of sections 184(1)(a) (now 94(1)(a)) and 199 (now 109) of the Code discussed by the Board. In fact, such a connection was only made in one case: the Ottawa-Carleton Regional Transit Commission (475), *supra*, where the Board stated:

"Since section 199 [now section 109] of the Code clearly has no application in this case, it goes without saying that those entities as trade unions have the right of access to the employers premises only as provided for in the collective agreements affecting their respective bargaining unit. ICTU has no right of access under the Code vis-à-vis the ATU bargaining unit and vice-versa."

(page 207; and 141)

This obiter dictum appears to conclude that access to the employer's premises by non-employee union officials could only occur pursuant to section 109 of the Code. However, it only dealt with the rights of the representatives of a union which did not

represent employees in the bargaining unit in question on the employer's premises but which was attempting to raid. It did recognize however that section 109 had no application to employees who do not live in an isolated location on premises controlled by their employer.

We therefore conclude that section 109 is not a complete code of access to employer premises since it deals only with access to employees **living in an isolated location on premises owned or controlled by their employer or by another person, ...** . This section is only directed to premises on which employees live, not to premises where they work.

2. Section 94(1)(a)

It is trite law that the employer's actions need not be motivated by anti-union animus for there to be a violation of section 94(1)(a). See Canadian Broadcasting Corporation (839), *supra*; Canadian Broadcasting Corporation (Ciné Le Matou Inc. (1987) (646), *supra*; Maritime Employers' Association (1985), 63 di 69; and 12 CLRBR (NS) 18 (CLRBR no. 540); Canadian Pacific Air Lines Limited (1981), 45 di 204; [1982] 1 Can LRBR 3; and 82 CLLC 16,138 (CLRBR no. 334); Canadian Imperial Bank of Commerce, North Hills and Victoria Hills Branches (173), *supra*; Bell Canada (1981), 42 di 298; [1981] 2 Can LRBR 148; and 81 CLLC 16,083 (CLRBR no. 292); Bernshine Mobile Maintenance Ltd. (1984), 56 di 83; 7 CLRBR (NS) 21; and 84 CLLC 16,036 (CLRBR no. 465); Ottawa-Carleton Regional Transit Commission (475), *supra*; Canadian Imperial Bank of Commerce (1985), 60 di 19; 10 CLRBR (NS) 182; and 85 CLLC 16,021 (CLRBR no. 499); and Okanagan Helicopters Ltd. (1985), 62 di 21; 10 CLRBR (NS) 385; and 85 CLLC 16,037 (CLRBR no. 521). The Board thus will not deal with the question of anti-union animus any further in this case.

Parliament has used broad language in prohibiting employers or persons acting on their behalf from participating in, or interfering with, the formation or administration of a trade union or the representation of employees by a trade union. The purpose

of section 94(1)(a), sometimes referred to by the Board as an "omnibus provision", is twofold. First, section 94(1)(a) is designed to provide employees with broad protection from an employer's interference with their rights and freedoms recognized by section 8 of the Code. In Canada Post Corporation (544), supra, the Board stated the following:

"This prohibition of section 184(1)(a) [section 94(1)(a)] is designed to give meaning to the basic freedoms spelled out in section 110(1) of the Code [now section 8]... which reads as follows:

110. (1) Every employee is free to join the trade union of his choice and to participate in its lawful activities.

Precedent has established that the scope of section 184(1)(a) is broad enough to encompass all the rights embodied in section 110(1) that are not specifically protected by section 184(3) of the Code. In short, section 184(1)(a) is an omnibus provision, a shield that protects against employer interference with all the basic rights that the Code confers on employees."

(page 154)

This provision is also aimed at protecting the union which ought to be free from improper interference by the employer in determining the manner in which it will administer itself and represent the employees of the employer. For example, in Canada Post Corporation (772), supra, the Board had this to say.

"... s. 94(1)(a) is directed at the protection of the entity rather than individual basic freedoms under section 8(1). These provisions do not contemplate that union administration or that the representation of employees by a trade union will be restricted to employees under the Code. The reality of the trade union movement is that a great number of union representatives are employees of the trade union rather than employees in bargaining units employed by employers under the Code. In this case we view Messrs. Metcalfe and Vandonk as elected union representatives of the trade union as an entity which is protected by section 94(1)(a) of the Code rather than

employees who are exercising their rights and basic freedoms under section 8(1) to participate in the lawful activities of the trade union of their choice. It is not necessary to be employees to receive the protection offered trade-union representation by section 94(1)(a). ..."

(pages 127-128; and 250; emphasis added)

In ATV New Brunswick Limited (CKCW-TV) (1978), 29 di 23; and [1979] 3 Can LRBR 342 (CLRB no. 149), the Board first described the three notions of formation, administration and representation in the following terms.

"1. The formation of a union. This is the initial stage, and can be viewed as the first step towards collective bargaining. The trade union must have a recognized status.

2. The administration of the union. This is directed at the protection of the legal entity, and involves such matters as elections of officers, collecting of money, expenditure of this money, general meetings of the members, etc. in a word all internal matters of a trade union considered as a business. This is to assure that the employer will not control the union with which it will negotiate and thus assure that the negotiations will be conducted at arms length.

...

3. The representation of employees by a trade union. We are of opinion that "representation" as used here deals mainly with collective bargaining. The main objective of 184(1)(a) is to protect the bargaining rights of the bargaining agent to negotiate collectively. It is because of this subsection that the employer cannot negotiate working conditions directly with his employees, either collectively or individually, without the permission of the union. It is a necessary corollary to protect the rights of the union given to it by section 136(1) of the Code."

(pages 28-29; and 346-347)

This was expanded further in Royal Bank of Canada, Jonquière and Kenogami (1980), 42 di 125 (CLRB no. 279) where the Board stated:

"A careful reading of the French version of the Code would seem to indicate that the legislator wanted to put into the Code a prohibition against employer domination of unions. Under paragraph (a) of section 184(1), the Code prohibits the employer from participating in the formation or administration of a trade union or the representation of employees by a trade union. Through an inversion in the text, he adds that an employer is also prohibited from interfering with the formation and administration of a trade union and from interfering with the representation of employees by a trade union. Paragraph (b) seems to support the thesis that domination is the main issue; by the nature of the exceptions listed therein, subsection (2) does not enlarge upon or clarify this apparent meaning. However, a reading of the English version adds another dimension to this section. The expression "interfere with" is used in parallel with the French expression "s'y ingérer". It seems to us, from the English version, that the legislator is prohibiting two well-known and notorious labour relations practices in which some employers indulge. The first is the domination or attempted domination of the formation and administration of a trade union and the domination or attempted domination of the representation of employees by a trade union. The second is interference with the formation and administration of a trade union or interference with the representation of employees by a trade union. We prefer the English version because we are of opinion that Parliament really wanted to prohibit both employer domination of trade unions and interference with their formation and administration and interference with the representation of employees by trade unions."

(pages 163-164; emphasis added)

Notwithstanding the broad protection that section 94(1)(a) provides, the Board has recognized that not all union activities fall under its umbrella: For example in Brazeau Transport Inc. (1979), 35 di 163 (CLRB no. 210), the Board said the following:

"Union activities - whether those of the union's executive, its officers or its members - must be carried out within the framework

recognized by the Code. The only union activities that are protected are those which are recognized by the Code. Section 184 cannot serve as a umbrella for all union activities regardless of their merits. A union president who speaks on behalf of his organization's members is clearly taking an action that can always be associated with the performance of union activities. This does not give him free rein to do anything whatsoever at any time because his actions fall within the framework of union activities. To say that it did would force us to recognize anarchy and chaos, which are precisely what the Code seeks to avoid by setting forth rules and a framework within which the said union activities must be carried out."

(pages 166-167)

Furthermore, there are implicit limitations to the protection of union rights brought about by the employer's property rights or the employer's right to manage its affairs and maintain an efficient business. In order to determine whether the employer's action has the effect of interfering with the formation or administration of a union or its representation of employees, the Board has developed a "balancing test" according to which an employer must have "compelling and justifiable business reasons" in order to offset the exercise by the employees and the union of their lawful activities under the Code.

The compelling and justifiable business reasons test was first established by the Board in Bell Canada, August 22, 1975 (LD 19):

"Section 110(1) of the Canada Labour Code guaranteed to employees the right to join the trade union of their choice and to participate in its lawful activities. The basic freedoms thus protected include the right to distribute or otherwise disseminate and receive information about a trade union and its activities and the right to sign a membership card, provided these activities do not take place during the working hours of the employees involved. An employer may not without compelling business reasons, prohibit employees from exercising these rights on company premises."

(page 2)

Also, in Canada Post Corporation (620), supra, the Board defined compelling and justifiable business reasons as:

"For an employer to establish compelling and justifiable business reasons, it must show that its operations are being disrupted or that other legitimate business interests are being adversely affected."

(page 99)

Many of the leading cases which established and developed the "compelling and justifiable business reasons test" dealt with situations where the union was seeking access to solicit members. They mostly dealt with the formation of the union. Cases such as Michelin Tires (Canada Limited), supra and T. Eaton Co. Ltd. and RWDSU, supra, on which the employer relies are of this type.

Other leading cases where access to employer premises have been in question have dealt with union activity which is not protected activity. Adams Mine, Cliffs of Canada Ltd., Manager, supra, also relied on by the employer is such a case.

In both types of cases the approach has differed based on whether an employer was dealing with its own employees or with a stranger with whom it had no relation. For example, in Michelin Tires (Canada Limited), supra, the Nova Scotia Board stated:

"It goes without saying that Michelin is not required to admit non-employees, or employees not scheduled to work, to its premises, nor does the Trade Union Act license employees to move freely about the plant. The Company has legitimate reasons relating to security and safety for limiting such movement."

(page 403)

Such an approach has not been followed by this Board where a different approach has been developed in connection with solicitation on employer premises. See Maritime Employers Association (540), supra; Canadian Imperial Bank of Commerce, North Hills and Victoria Hills Branches (173), supra; CFCN-Television, a division of CFCN Communications Limited) (719), supra. Thus employer's actions that actually interfere with the rights protected under section 94(1)(a) will be assessed on the basis that the Code take precedence over any employer rule. In Time Air Inc. (734), supra, the Board stated:

"... The bottom line is clearly set out in sections 8 and 94(1) of the Code: an employer may not prevent any union activity at the workplace, with the exception that those activities pertaining to solicitation may not occur during working hours."

(page 63; 241; and 14,136)

In an obiter dictum in Canada Post Corporation (693), supra, the Board stated:

"In any event, the Board believes that the fundamental principle cited in the foregoing paragraph could probably support a conclusion that any employer who tried to bar union officials, whether active employees or not, from access to employer premises for the purposes of transacting legitimate union business during non-working times might well be in violation of section 184(1)(a) - might, by the imposition of such a bar, be interfering with the representation of employees by a trade union. We have in mind particularly union officials who represent the employees in question by reason of there being in existence a certification order giving the union bargaining rights for a unit of such employees and/or a collective agreement between the union and the employer. And we also recognize that the kinds of qualifiers listed above could properly be applied in respect to such access. All this is said in passing, however."

(page 80)

VIII

Given this Board's precedents discussed above and having considered all the evidence heard in this case, we find that the access requested in this case by NABET is a necessary incident of its rights protected by section 94(1) of the Code, particularly its rights of administration. As we have seen in ATV New Brunswick Limited (CKCW-TV), supra, "administration" of a trade union deals with "all internal matters of a trade union considered as a business." The evidence in this case has established that the complainant herein is seeking to conduct its business at CFTO in the same fashion as it conducts its business everywhere else in Canada and in the same manner as it used to conduct its business at CFTO. The refusal of the employer to permit access to the union representative in question had the effect of interfering with the administration of this trade union and its representation of the employees. If the interference had been solely with respect to the representation of the employees, the Board might well have been content to defer to arbitration pursuant to section 98(3) based on the premise that an arbitrator or arbitration board could have dealt with the issues of representation. However, no arbitrator or arbitration board could properly deal with the issue of interference in union administration in question here.

As seen above, employer action which interferes with the formation or administration of a trade union or the representation of employees by a trade union can only be justified by compelling and justifiable business reasons. After having considered all the evidence, we do not find that CFTO had compelling business reasons to refuse access to the union representative in the circumstances of this case. It based its refusal on the idea that the union had no right of access to the employer's property and on some vague notion of possible disruption of the workplace. We are not prepared to conclude that CFTO was dealing with a stranger with whom it had no relation because the union's representative seeking access is not one of its employees. CFTO has had a relation with NABET and its predecessors for more than 30 years,

NABET is not a stranger in this context, of which a particularly telling fact is that, prior to 1988, the union's national representative had unrestricted access to its premises.

In dealing with NABET herein, CFTO never considered the statutory rights conferred upon the union by the Code, it never tried to reconcile its own legitimate business concerns with its employees' own legitimate statutory union rights but rather relied upon its strict property rights to found its refusal.

For all these reasons, the majority finds that CFTO violated section 94(1)(a) of the Code when it refused access to the union representative in the circumstances of this case.

IX

The complainant NABET sought the following remedies when it made its complaint: a) a declaration that the respondent has violated and continues to violate the Canada Labour Code; b) an order directing the respondent to cease and desist violating the Canada Labour Code; c) an order directing the respondent to provide the complainant with access to bargaining unit members at the respondent's premises in order to allow the complainant to address employment issues from time to time; d) such further relief as the complainant may request and the Board may see fit to grant.

The remedial authority of the Board when it finds the violation section 94(1)(a) is contained in section 99 of the Code. That section reads as follows:

"99. (1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 50, 69, 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

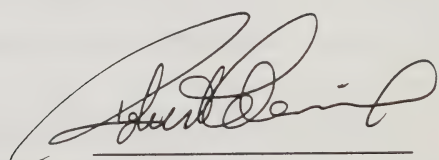
...

(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

The Board therefore declares that when CFTO refused access to its premises to the national representative of the union in the circumstances of this case, it violated section 94(1)(a) of the Code and it shall refrain from so doing in the future. Pursuant to section 99(2), and in order to remedy such violation, the Board directs the respondent CFTO to grant the complainant access to its premises subject to such reasonable conditions as the parties may agree upon and, failing such agreement, the Board retains jurisdiction to determine the conditions upon which access will be granted. The Board appoints Ms. Carol Garrow, Senior Labour Relations Officer in its Toronto Regional Office, to assist the parties in the implementation of the said orders.



J. Philippe Morneau
Vice-Chair



Robert Cadieux
Member

Reasons for the dissent of Ms. Véronique L. Marleau, Member

I have read my colleagues' reasons for decision and, with respect, I must dissent. My point of departure is that I do not believe that the Code protects the access sought by NABET to the employer's property. This case does not turn on a union's right to administer itself and to represent employees without an employer's improper interference, a right which is protected by section 94(1)(a) of the Code. Rather, it turns on the interpretation of an article of the collective agreement, since the parties have elected to negotiate a right of access. Thus, the Board, in my opinion, should have refused to hear and determine this matter on the grounds that arbitration was the proper forum for resolving this dispute.

I

The Facts

The factual setting for these issues need not be set out in great detail. The dispute dates back to 1988 when CFTO locked out its employees. Apparently, prior to the lockout NABET never had access problems. After the lockout was settled in August 1988, NABET representatives were denied access to CFTO's premises for the purpose of conducting union business. They decided to wait until the climate was more favourable to again request permission to visit. In 1993, Mr. Bryon Lowe, the representative for the CFTO bargaining unit, felt that it was time to approach CFTO again to seek the right to call on bargaining unit members.

On March 1, 1993, NABET resumed its requests for access to the employer's premises by making a formal request in writing. The next day, CFTO denied that request. Referring to article 4.3 of the collective agreement, CFTO stated that, without receiving specific details from the union of the nature of the visit, it would not permit access. NABET reiterated its request until July 5, 1993, and the employer continued to deny access to NABET's non-employee representative on the grounds that NABET's request did not comply with article 4.3 of the collective agreement and

that NABET's presence during working hours would interfere with the orderly conduct of its business. It is following this refusal that NABET filed the present complaint with the Board.

Although the collective agreement contains a provision on "Union Access to Premises" which, *prima facie*, deals with the rights of the parties on this very issue, NABET at no time grieved the employer's refusal to grant the access it sought. Article 4.3 of the collective agreement reads as follows:

"4.3 Union Access to Premises - Representatives of the Union shall have access to the Company's premises to carry on inspections or investigations pertaining to the terms and conditions of this Agreement at any operating unit of the Company, at reasonable notice to the Company, and free from unreasonable interference from the Company. Such investigation or inspection shall be carried on at reasonable hours and in such manner as not to interfere with the normal operations of the Company. The Company will furnish suitable identification for the representative entitling admission to the premises of the Company and other places where employees covered by this Agreement may be working."

(emphasis added)

Instead, NABET filed this complaint pursuant to section 94(1)(a) of the Code, asking the Board to grant "access to bargaining unit members at the respondent's premises in order to allow [the union] to address employment issues from time to time." It alleged that the access referred to in article 4.3 of the collective agreement was not sufficiently broad and argued that this complaint involved statutory rights and not rights under the collective agreement. According to NABET, its request for access was separate from any collective agreement provisions dealing with access to the employer's premises, as a union has a broader right of access under the Code generally.

II

Deferral to arbitration

The majority has taken the view that this complaint alleging violation of section 94(1)(a) of the Code had to be dealt with on its merits since it "raises statutory issues that could not be properly or totally addressed in arbitration". The majority therefore refused to exercise its discretion pursuant to section 98(3) of the Code.

Section 98(3) of the Code gives the Board discretion to refuse to hear and determine a complaint involving a matter that, in the Board's opinion, could be referred to arbitration pursuant to the collective agreement. The purpose and structure of the Code are such that once the parties have dealt with an issue and incorporated it into their collective agreement, the Board must allow the parties to resolve it through their arbitration procedures. Thus, the Board's approach to exercising its discretion pursuant to section 98(3) has been to favour deferral to arbitration when the matter is one which could be resolved through the grievance procedure. The Board will only depart from this rule when it is of the opinion that the matter could not be entirely resolved at arbitration because it raises issues going beyond the scope of the collective agreement which would warrant the Board's intervention, such as a question of public policy or a genuine statutory issue that must be defined or reaffirmed (see Bell Canada (1977), 20 di 356; [1978] 1 Can LRBR 1; and 78 CLLC 16,126 (CLRB no. 97), pages 363-365; 7-8; and 374-375; Bank of Montreal, Devonshire Mall Branch (1982), 51 di 160; and 83 CLLC 16,015 (CLRB no. 404); Canada Post Corporation (1983), 52 di 106; and 83 CLLC 16,047 (CLRB no. 426); Canada Post Corporation (1987), 69 di 91 (CLRB no. 620); Canada Post Corporation (1987), 71 di 177 (CLRB no. 652); Wardair Canada Inc. (1988), 76 di 123; and 89 CLLC 16,009 (CLRB no. 722); Canada Post Corporation (1989), 76 di 212 (CLRB no. 729), page 215; Canada Post Corporation (1990), 81 di 28; and 12 CLRBR (2d) 117 (CLRB no. 800); Ottawa-Carleton Regional Transit Commission (1990), 81 di 88 (CLRB no. 805), page 95;

Québecair (1990), 82 di 190 (CLRB no. 827); and Wackenhut of Canada Limited (1994), as yet unreported CLRB decision no. 1074, at pages 4-5.

This reasoning is explained in Canada Post Corporation (729), *supra*, at pages 215-216:

"... It is our view that this Board ought not to interfere with this phase of the free collective bargaining process by making itself available as an alternate forum thereby allowing the parties to abrogate their responsibilities. Where there is a collective bargaining regime in place, it seems to us that the Board should deal only with complaints from the parties where there are circumstances going beyond the scope of the collective agreement which would warrant the Board's intervention. This is certainly the approach being taken by the courts who have been showing more and more deference to the arbitration process over the past decade - see St. Anne Nackawic Pulp and Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R. 704."

In Canada Post Corporation (1988), 74 di 72 (CLRB no. 693), the Board, for this very reason, deferred to arbitration an issue of access involving the full-time president of CUPW precisely because the collective agreement contained a provision on that issue:

"In the case of Canada Post and CUPW there is no rule by the employer barring access of union officials, whether active employees or not. In fact, there is an article in the collective agreement which acknowledges the legitimacy of such access and which only seeks to regulate it, presumably in the interests of the productivity and security of the post office, which are legitimate concerns. What happened in Vancouver had to do basically with the administration of article 3.04 of the agreement and very little to do with any principle arising out of section 184(1)(a) [now section 94(1)(a)] of the Canada Labour Code."

(page 80; emphasis added)

The instant case is no different. The parties have already turned their minds to the very issue, union access, in their own context. All they need now is for an arbitrator to determine the particulars of the right of access they have negotiated having regard to the intended time of access and to what constitutes reasonableness in the circumstances.

It has long been recognized that union activity by non-employee union representatives on company property is not a matter of right but rather a matter of collective bargaining, and collective agreements are replete with negotiated concessions in which the employer has surrendered or qualified its otherwise absolute right by permitting the union to conduct union activities on its premises. The law has not been generous in making accommodations for access rights of non-employees. Except in cases provided in section 109, an employer has no obligation to grant access to its premises to persons other than its employees, even outside working hours, simply because the union feels that this would best meet its own needs.

Therefore, this is a matter to be deferred to arbitration because it does not raise a genuine statutory issue or an issue which affects the public interest. No right at issue here requires the Board's intervention. Non-employee union representatives do not enjoy a right of access under the Code in the circumstances alleged in this case and to which section 109 of the Code does not apply. In Ottawa-Carleton Regional Transit Commission (1984), 56 di 203; and 7 CLRBR (NS) 137 (CLRB no. 475), the Board clearly set out this principle:

"... Since s. 199 [now 109] of the Code clearly has no application in this case, it goes without saying that those entities as trade unions have the right of access to the employer's premises only as provided for in the collective agreements affecting their respective bargaining units. ICTU has no right of access under the Code vis-à-vis the ATU bargaining unit and vice-versa."

(pages 207; and 141; emphasis added)

Further, while it is understandable that NABET would prefer to communicate directly with employees on company property rather than use other communication channels, the fact remains that an employer is not required under the Code to facilitate a union's relationship with its members.

Given the history of the parties' relationship, one might find the employer to have displayed little consideration for labour relations when it denied access to its premises in the fashion it did. However, much as one might question the wisdom of the employer's approach, the fact remains that the right that the union sought to enforce is not protected by the Code. Therefore, the employer's refusal, *per se*, could not amount to overt conduct which could be viewed as an unfair labour practice.

The Board has made it abundantly clear that it will not allow complainants to avoid their responsibilities pertaining to the free collective bargaining process by letting them use the Board as an alternate forum (see Canada Post Corporation (693), *supra*). As the Board stated in Maritime Employers' Association and Termont Terminal Inc. (1991), 84 di 53; and 15 CLRBR (2d) 102 (CLRB no. 850):

"... The union cannot assert its right to negotiate these matters with the full force of Part I of the Code and in the same breath disregard what it has negotiated. The issue here is one of good faith and sound labour relations. If the employer contravenes the agreement, the remedies are there, just as they are when it contravenes the Code. However, it is difficult to see how the union could allege that Termont [the employer] contravened the Code when in fact Termont insisted that the channels of communication negotiated by the parties be followed. Finally, on examining the evidence, the Board does not believe, despite the appearances, that anti-union animus was present in the instant case."

(pages 67; and 115-116)

Here, although the parties had negotiated a procedure governing access to the employer's premises, NABET made no attempt to grieve its application through the

grievance-arbitration procedure.

Moreover, complainants, it seems to me, also have a social responsibility to give priority to private dispute resolution mechanisms whenever the dispute is one which can be resolved by such forums. There is simply no reason why Canadian taxpayers should bear the costs associated with private disputes when a private forum for resolving such disputes exists and can be put to good use.

Therefore, I would have refused to hear the complaint on the grounds that the matter could have been deferred to arbitration, and thereby avoided interfering in the arbitrator's function by granting or denying worksite access to a union representative for reasons that might conflict with the parties' intention as reflected in article 4.3 of their collective agreement.

Having found that an application of section 98(3) would dispose of the matter, I consider it unnecessary to deal with the timeliness issue. However, I feel I must comment on the merits of the case for the reasons given below.

III

Merits of the complaint

The majority's position rests on the assumption that a union's rights to administer its affairs and to represent employees protected by section 94(1)(a) of the Code necessarily encompass a right of access to an employer's premises, and this, *by non-employees, during working hours*. Non-employee union representatives, it is said, enjoy a right of access that exists apart from any collective agreement, and this right is broader in scope than the terms of the access clause negotiated by the parties in this case because it also relates to the administration of a trade union. Hence the conclusion that since the request for access was denied, this necessarily constitutes a

breach of section 94(1)(a) and, therefore, an unfair labour practice. With all due respect to the majority's opinion, I am unable to agree with this conclusion.

In a section 94(1)(a) complaint, the Board must determine (1) whether the activity in question fell within section 94(1)(a) of the Code, and whether there was employer interference; and (2) if interference in a union activity occurred, whether it was justified. As the Supreme Court of Canada stated recently in Goldhawk:

"... The Board has relied on its expertise in the area of labour relations to develop a two-part test in adjudication of claims under s. 94(1)(a). The first part of the test involves a characterization of the activities of the union and a determination as to whether there has been employer interference with them. If such interference is made out by the union, the Board goes on to consider the second part of the test: whether there was justification for the interference. ..."

(Canadian Broadcasting Corporation v. Canada Labour Relations Board, as yet unreported judgment of the S.C.C. rendered on January 27, 1995, at page 20 of Iacobucci J.'s reasons, concurred with by Lamer C.J., Cory J. Major J.)

Although section 94(1)(a) confers an extremely broad protection in the sense that it may override the usual rights of an employer, the Board has recognized that not all trade union activities come under that provision:

"Union activities - whether those of the union's executive, its officer or its members - must be carried out within the framework recognized by the Code. The only union activities that are protected are those which are recognized by the Code. Section 184 [now section 94] cannot serve as an umbrella for all union activities regardless of their merits. A union president who speaks on behalf of his organization's members is clearly taking an action that can always be associated with the performance of union activities. This does not give him a free rein to do anything whatsoever at any time because his actions fall within the framework of union activities. To say that it did would force us to recognize anarchy and chaos, which are precisely what the Code seeks

to avoid by setting forth rules and a framework within which the said union activities must be carried out."

(Brazeau Transport Inc. (1979), 35 di 163 (CLRB no. 210), pages 166-167; emphasis added)

Section 94(1)(a) deals with the formation of a trade union, the administration of a trade union and the representation of employees by a trade union, and is directed to the protection of these functions. The word "administration" as used in section 94(1)(a) is directed at the protection of the legal entity and involves all internal matters of a trade union considered as a business. This is to assure that the negotiations will be conducted at arm's length. The majority suggests that "administration of a trade union" also includes the right to conduct internal union business on the employer's premises, and that in this case the employer's denial of the access sought for such purposes thus going to the administration of the trade union, was interference with the administration. With respect, I do not agree with this interpretation. The union's right to administer its business without interference does not give it a right to do so on the employer's premises.

An employer does not have under the Code a positive duty to facilitate a union's relationship with its members. The code of conduct imposed on employers by section 94(1)(a) is phrased in negative terms. Pursuant to section 94(1)(a) of the Code, employers may not engage in conduct that might conflict with the characteristic of neutrality urged on them when it involves matters of employees or trade union exercise of their rights under the Code. Exceptions to that rule are found in section 94(2) which deems certain forms of employer interference to be lawful; but even there, the Code speaks in terms of privileges, not of rights. For instance, were it not for section 94(2), the mere fact of an employer *permitting* a union to use its premises for the purposes of the trade union or of *permitting* a representative of the trade union to confer with him during hours of work would constitute a breach of section 94(1)(a)

of the Code. Section 94(2) of the Code provides:

94.(2) An employer is deemed not to contravene subsection (1) by reason only that he

(a) in respect of a trade union that is the bargaining agent for a bargaining unit comprised of or including employees of the employer,

(i) permits an employee or representative of the trade union to confer with him during hours of work or to attend to the business of the trade union during hours of work without any deduction from wages or any deduction of time worked for the employer,

(ii) provides free transportation to representatives of the trade union for purposes of collective bargaining, the administration of a collective agreement and related matters, or

(iii) permits the trade union to use his premises for the purposes of the trade union; or

(b) contributes financial support to any pension, health or other welfare trust fund the sole purpose of which is to provide pension, health or other welfare rights or benefits to employees."

It follows that although there is no doubt that union communication, for the purposes contemplated by section 8(1) of the Code, is an activity that comes under section 94(1)(a), access to an employer's premises by non-employees for communication purposes even if they are union officials, is not included in this protection. In other words, it is not necessarily incidental to that activity such that it may be considered as an integral part thereof. To conclude otherwise would be to interpret section 94(1)(a) as imposing on employers an obligation to engage in overt conduct in connection with union activity, which in my view is precisely what the section seeks to avoid.

That conclusion is also consistent with the scheme of the Code which does not prevent an employer from refusing to allow non-employee union representatives on its

premises. Property rights have not disappeared under the Code. The work place, although an obvious forum for union activity, is still controlled by the employer and its primary object still remains production not the facilitation of trade unionism (see George W. Adams, Q.C., Canadian Labour Law, 2nd ed. (Aurora, Ont.: Canada Law Book Inc., 1993), pages 10-37 and 10-38). When enacting the Code and establishing the collective bargaining scheme, Parliament recognized the need for a statutory exception to the strict application of those common law principles in order to ensure the promotion of effective collective bargaining. However, Parliament limited the scope of this exception to cases where no reasonable alternatives for communication between union and workers exist off company property. Pursuant to section 109 of the Code, the right to exclude from property must only yield to the extent needed to permit communication of information, where the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual communication channels:

"109. (1) Where the Board receives from a trade union an application for an order granting an authorized representative of the trade union access to employees living in an isolated location on premises owned or controlled by their employer or by any other person, the Board may make an order granting the authorized representative of the trade union designated in the order access to the employees on the premises of their employer or such other person, as the case may be, that are designated in the order if the Board determines that access to the employees

- (a) would be impracticable unless permitted on premises owned or controlled by their employer or by such other person; and*
- (b) is reasonably required for purposes relating to soliciting union memberships, the negotiation or administration of a collective agreement, the processing of a grievance or the provision of a union service to employees."*

(emphasis added)

When section 109 does not apply, we must therefore conclude that with respect to an employer's premises, non employee union officials remain in the same position as any stranger. Thus, union activities carried out by non-employee union officials on employer premises are excluded from the application of section 94(1)(a) (see Ottawa-Carleton Regional Transit Commission, *supra*, pages 207; and 141), unless they are conducted pursuant to the terms of an order made by the Board under section 109 of the Code.

This is also the interpretation given by the Ontario Labour Relations Board to section 11 of the Ontario Labour Relations Act, R.S.O. 1980, c. L-2, an access provision similar to section 109 of the Code. In Adams Mine, Cliffs of Canada Ltd., Manager (1982), 1 CLRBR (NS) 384 (Ont.), the OLRB had to determine whether political canvassing on employer property by employee union representatives outside working hours was a protected activity under the statute. In concluding that it was not, the OLRB noted that such a right could exist pursuant to the terms of a collective agreement, and that as such that right could be upheld by an arbitrator. While recognizing that the work place is the most effective location to carry out union activity such as organizing and collective bargaining, the OLRB also recognized that the work place belongs to the employer and exists for the primary purpose of carrying out business activity. In this regard, Chairman Adams (as he was then) had the following to say about access rights of non-employee union officials:

"It is to be noted that the statute provides a more specific and different balance between an employer's property interest and the right of non-employees to solicit union membership from employees on company property. In this regard, s. 11 provides that where employees of an employer reside on the property of the employer, the employer when directed by the Board, shall allow a representative of a trade union access to the property for the purpose of attempting to persuade the employees to join a trade union. Therefore, the statute acknowledges the right of an employer to raise his property rights against strangers to the employment relationship even though the

strangers are union organizers and their involvement on company property during the non-working time would not interfere with any bona fide management interest. The attempt here is to accommodate the right of property and the right to organize 'with as little destruction of one as is consistent with the maintenance of the other'. See N.L.R.B. v. Babcock and Wilcox Co. (1956), 38 LRRM 2001 at 2004. If employees have the right to carry on organizing activity on company premises, it does not seem an unfair balance of interests to limit strangers to the usual channels of communication with those employees off company premises. See also the approach of the Supreme Court of Canada in dealing with competing proprietary and collective bargaining claims between strangers, in a case involving an employer's landlord and striking employees in Harrison and Carswell (1975), 75 CLLC 14,286 (SCC).

From this analysis we arrive at the following general principles:

- (a) No-solicitation or no-distribution rules which prohibit union solicitation on company property by employees during their non-working time are presumptively an unreasonable impediment to self-organization and are therefore invalid; however, such rules may be validated by evidence that special circumstances make the rule necessary in order to maintain production or discipline;*
- (b) No-solicitation or no-distribution rules which prohibit union solicitation by employees during working time are presumptively valid as to their promulgation, in the absence of evidence that the rule was adopted for a discriminatory purpose or applied unfairly; and no-solicitation or no-distribution rules which prohibit union solicitation by non-employee union organizers at any time on the employer's property are valid in the absence of an application for a direction pursuant to s. 11."*

(Adams Mines, supra, pages 397-398; emphasis added; see also to the same effect Michelin Tires (Canada) Limited, [1979] 2 Can LRBR 388 (N.S.), pages 402-403)

On the other hand, this case is not one of union organizing where it could be argued, based on a certain line of reasoning previously endorsed by this Board, that section 95(d) of the Code, by virtue of an *a contrario* reading, has the effect of creating an

additional exception to that found in section 109 by affording union organizers a qualified right of access to company property outside the employees' working hours because the union does not yet have an established presence among the workforce (see Canadian Imperial bank of Commerce (1985) 60 di 19 (CLRB no. 499) where the Board found that the union did not violate section 95(d) by placing material on desks and chairs during non-working hours; to the same effect see also T. Eaton Company Limited [1985] OLRB Rep. June 941; upheld by The Cadillac Fairview Corporation Limited [1989] OLRB Rep. Dec. 1292 (Ont. C.A.); (1988), 62 O.R. 2d 337).

Employees have a different status in that they are on the employer's premises with the employer's permission. As such, their access to company property is governed by different considerations. This is why the Board's balancing function has led it to determine that the Code confers on employees a *qualified* right to conduct union activities on the employer's premises. In such instances, the Board found that *employees* may claim the protection of the Code but only when they conduct union activities *outside working hours*. In such cases, an employer may only justify attempts to interfere with employee activities when it can show that there exist compelling reasons for doing so. That is what the Board found in Bell Canada, August 22, 1975 (LD no. 19), upheld by the Federal Court of Appeal in Bell Canada v. Communications Workers of Canada et al., [1976] 1 F.C. 459:

"The Board finds that the crucial issue in the instant case is whether Bell Canada can prevent its employees from soliciting membership in a trade union and distributing union literature on company premises by making such behavior subject to disciplinary action, when these activities take place outside the working hours of the employees involved. The Board finds that Bell Canada may not do so without violating the provisions of the Canada Labour Code (Part V - Industrial Relations), and particularly the provisions of Sections 184(1)(a) and 184(3)(b) [now sections 94(1)(a) and 94(3)(b)] of the Code.

Section 110(1) [now section 8(1)] of the Canada Labour Code

guarantees to employees the right to join the trade union of their choice and 'to participate in its lawful activities'. The basic freedoms thus protected include the right to distribute or otherwise disseminate and receive information about a trade union and its activities and the right to sign a membership card, provided these activities do not take place during the working hours of the employees involved. An employer may not without compelling business reasons, prohibit employees from exercising these rights on company premises. To do so amounts to behaviour that is prohibited by the provisions of Sections 184(1)(a) and 184(3)(b) of the Canada Labour Code (Part V - Industrial Relations).

The Board further finds that the property rights of the employer must be exercised in a manner that is consistent with the basic freedoms guaranteed to employees by the Code. Of course, the employer has the right to maintain production, to enforce discipline and to safeguard the safety and security of its property and premises. Nevertheless, it may not, without compelling reasons, attempt to do so by prohibiting employee activities that are expressly protected by the Code. In the instant case, there is no reason to believe that these basic interests of Bell Canada cannot be protected by resort to customary disciplinary sanctions."

(page 2; emphasis added)

Since the access sought by NABET's non-employee union representative to the employer's premises did not meet the requirements of section 109, it necessarily follows that the present complaint did not involve a protected activity under the Code.

The majority decided otherwise, finding that the access sought was indeed an activity protected by section 94(1)(a). Implicit in the majority's reasoning is the conclusion that pursuant to section 94(1)(a), the union enjoys an unfettered discretion to choose the communication channel it wants to use even if this overrides the employer's property rights protected at common law and by the legislation governing trespass.

Section 109 represents a derogation to individual enjoyment of property rights at

common law and the Federal Court of Appeal narrowly construed the scope of that exception (see Dome Petroleum Limited (1980), 35 N.R. 243, page 247). Nevertheless, the majority suggests that because this exception applies only to the case of employees who live in isolated locations on employer-controlled premises, section 109 is not a complete "code of access" as it does not apply to employees who do not meet the requirements of that section. In other words, while recognizing that section 109 does not apply in the instant case, the majority suggests that this is not a bar to the protection extended by section 94(1)(a).

In my respectful opinion, section 94(1)(a) does not have such a sweeping effect. An exception does not swallow the rule which is, it seems to me what would happen if this reasoning were followed and the section 109 exception broadened such that an employer would have to grant access on its property anywhere and at anytime, simply because the protection of section 94(1)(a) would be construed as extending to such access. The protection extended to unions under section 94(1)(a) must be interpreted in light of the objects and purposes of the Code in the larger labour relations context, and this requires consideration of the impact and effect of section 109 of the Code on the scope of this protection. By enacting section 109, Parliament limited the possible extent of section 94(1)(a) and the Board's discretion under section 94(1)(a), by striking statutorily the appropriate balance between the union's representation rights and the employer's property rights. Parliament did not see fit to extend the scope of this exception to situations where normal communication channels are available (bulletin boards, meetings outside the employer's premises, presence of employee union representatives in the work place, i.e. shop stewards, etc.). Parliament clearly limited the instances where employers' property rights should yield to a bargaining agent's representation rights to those of employees living in an isolated location on premises owned or controlled by their employer or by any other person. The present case is not one of them.

The majority seems to suggest that when the requirements of section 109 are not met, section 94(1)(a) nevertheless protects access by non-employee union representatives if the Board is satisfied that the union has no practical means of reaching some of its members other than by visiting them on the employer's premises. In other words, despite the clear wording of section 109, the Board still has the discretion pursuant to section 94(1)(a) to determine that a right of access exists based on a subjective finding as to the efficiency and effectiveness of the alternative communications channels available. With respect, I disagree. In my opinion, the Board does not have such a discretion. The provisions of section 109 of the Code are specific and clear and the Board does not have the power to make an order granting access in cases which do not meet the requirements of that section.

Once the Board has concluded that a union activity comes within the ambit of section 94(1)(a) of the Code and that the employer has interfered with that activity, the Board must then consider the second part of the test, namely whether this interference is justified. If the activity at issue pertains to access by non-employee union representatives to an employer's premises, it is only when it is established that the access sought meets the requirements of section 109 that the Board applies a balancing test in order to strike the appropriate balance between the union's representation rights and the employer's competing interests. As the Board stated in Dome Petroleum Ltd. and Canadian Marine Drilling Ltd. (1980), 40 di 150; and [1980] 2 Can LRBR 533 (CLRBR no. 252):

"The purpose and necessity of section 199 [now section 109] need not be reviewed here. It was canvassed at length in Dome Petroleum Ltd., 27 di 653; [1978] 1 Can LRBR 393; and (1977), 78 CLLC 16,129. In that case we reviewed the antecedents to section 199 in Canada and described it as a limited derogation of property rights. We described our role as one of balancing property rights against the right of non-employees to gain access for the purposes expressed in section 199(1)(b)(ii)."

(pages 156; and 538; emphasis added)

In the instant case, the majority exercised this balancing function in the context of an access sought for *a non-isolated location, by a non-employee union representative, during working hours*, and for purposes that, to a large extent, *had nothing to do with collective bargaining*. Given this, the majority's conclusion that the employer's refusal was not justified constitutes, in my respectful opinion, a marked departure from the Board's policy with respect to the application of its balancing function.

When suggesting that the employer's refusal constituted an unjustified breach of the union's representation rights, the majority placed much reliance on the fact that NABET established that before the dispute leading to the lock-out in 1988, NABET never had an access problem, that in most collective agreements NABET negotiates in Canada the access provisions are similarly worded, and that its visits are permitted everywhere else it has members.

Although these facts could presumably be of some relevance in order to establish a past practice for the purposes of an arbitration of this issue under the collective agreement, I am unable to see how they relate here. The issue as to whether the employer's refusal amounted to improper interference does not turn on a determination based on an alleged past practice or on the current practice with other employers. Rather, it turns on the period contemplated for such access (outside vs. during working hours), and on the purposes of the access (matters related to section 8(1) of the Code vs. matters unrelated to union organizing or collective bargaining), once it is established that the access sought is an activity protected under the Code.

The majority's conclusion that the employer's refusal amounted to unjustified interference is also based on the finding that the union had no practical means to communicate with some of its members other than by visiting them on the employer's

premises. Because the individual seeking the access is not an employee and the situation does not come within the ambit of section 109 of the Code, I am also unable to see how this can be relevant in determining whether or not the employer's refusal was justified. In any event, I am unable to share the majority's findings of fact in this regard.

In the instant case, the evidence clearly showed that not only did other means of communication exist, but that they are used on a regular basis by the union. For instance, NABET admitted that it communicates with the employees regularly through the bulletin boards located at the employer's premises and that from time to time, it meets with the employees at a restaurant up the street from CFTO. Furthermore, the union does have a steward roster at CFTO, however incomplete it may be. Therefore, one cannot say that NABET is not already present within CFTO and that it cannot communicate with the employees via the existing channels.

Moreover, NABET admitted that the visits to the employer's premises are not aimed at being limited to matters relating to the collective bargaining process, but are also aimed at addressing internal union matters. At the hearing, it became clear that, despite what NABET had alleged in its letters to the employer, the main purpose of the visits was to boost union morale and enhance the union's image with bargaining unit members. Mr. Lowe admitted this and described the matters he wanted to address as *"small 'p' political union issues such as mergers and internal union affairs"*.

It is therefore readily apparent that the access sought by NABET was aimed at addressing issues largely unconnected to the collective bargaining process. Thus, even assuming that the Code did protect the type of access sought by the union, inasmuch as the employer could not separate those aspects of the request for access from those that were related to the collective bargaining process, the employer's refusal could not, even in the best of scenarios, be construed as a breach of the union's

representation rights. Clearly, were it not for the fact that section 94(1)(a) does not protect the type of access sought here, the employer nevertheless had compelling reasons to prohibit NABET from conducting its promotional activities on company property during the working hours of the employees involved.

For the foregoing reasons, I cannot see how the employer's refusal could possibly amount to unlawful interference in NABET's representation rights. All the employer did was to insist that the communication channels negotiated by the parties be followed. The fact that the union representative responsible for the bargaining unit at CFTO was able to inform the employees of the meetings through the shop stewards and bulletin boards on the employer's premises unequivocally confirms that NABET was not prevented from communicating. That such communication took a form different from that which it normally takes or from that which the union prefers in no way alters the fundamental fact that it communicated with its members.

I would dismiss the complaint.



Véronique L. Marleau
Member

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Summary

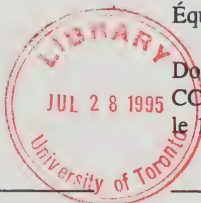
Syndicat des débardeurs de Trois-Rivières, Local 1375 (CUPE), *applicant*, and Maritime Employers' Association and Équipements Bellemare Ltée, *respondents*.

Board File: 610-130
CCRT/CLRB Decision no. 1112
March 16, 1995

Résumé

Syndicat des débardeurs de Trois-Rivières, section locale 1375 (SCFP), *requérant*, et l'Association des employeurs maritimes et Équipements Bellemare Ltée, *intimées*.

Dossier du Conseil: 610-130
CCRT/CLRB Décision n° 1112
le 16 mars 1995



This case deals with a referral pursuant to section 65 of the Canada Labour Code (Part I - Industrial Relations).

Il s'agit d'une demande de renvoi fondée sur l'article 65 du Code canadien du travail, (Partie I - Relations du travail).

In 1993, Ciment St-Laurent entered into a contract with Équipements Bellemare Ltée, a specialized intraprovincial transportation company. Under that contract, the respondent employer would deliver and load five cargos of powdered cement on board vessels going to Mexico from the port of Trois-Rivières. The applicant requested that the Board determine whether the employees of the respondent employer are engaged in longshoring activities in the geographical region of the ports of Trois-Rivières/Bécancour when they loaded the vessels and, consequently, whether the respondent employer was bound by the certification certificate held by the applicant union as well as by the collective agreement entered into by the applicant and the MEA.

En 1993, la compagnie Ciment St-Laurent a conclu une entente avec Équipements Bellemare Ltée, une compagnie de transport intraprovincial spécialisée, en vertu de laquelle cette dernière doit procéder à la livraison et au chargement de cinq cargaisons de ciment en poudre à bord de bateaux chargés de les livrer au Mexique depuis le port de Trois-Rivières. Le requérant demande au Conseil de déterminer si les employés d'Équipements Bellemare Ltée ont effectué des activités de débardage dans les limites géographiques du port de Trois-Rivières/Bécancour lorsqu'ils ont procédé au chargement dudit cargo et, par voie de conséquence, si Équipements Bellemare Ltée est liée par le certificat d'accréditation détenu par le syndicat requérant et la convention collective que ce dernier a conclue avec l'AEM.

The Board first considered the nature of the operations alleged to be longshoring activities by the applicant. Having reviewed the applicable case law, the Board found that the

Le Conseil a d'abord examiné la nature des activités qui, selon le requérant, constitueraient du débardage. Après une analyse de la jurisprudence, le Conseil a

tasks performed by the employees of Équipements Bellemare Ltée were longshoring activities. As this determination does not on its own determine whether the employer was engaged in longshoring within the meaning of section 34, the Board examined the specific context in which the activities were in fact carried out, especially with respect its primary business mandate and mode of operation as a specialized transport business, to identify whether they constitute self-sufficient activities or relate instead in an ancillary manner to its regular activities.

The Board concluded that the longshoring activities carried out by the respondent employer were in fact separate from its regular and usual activities. They were, in view of their connection with maritime transportation, activities not essential to the operation of the intraprovincial transportation business.

The Board then considered the existence of a federal undertaking engaged in longshoring. It concluded that the portion of the business devoted to longshoring was an "undertaking" within the meaning of the applicable case law. The Board also examined the employer's status as a "going concern." It asks itself whether establishing de facto a longshoring business within an intraprovincial transportation company reflected a commitment on the part of the respondent employer to diversify or whether it was a one-contract exercise, the conclusion of which marked the end of its longshoring activities.

déterminé que les tâches effectuées par les employés d'Équipements Bellemare Ltée constituent en effet du débardage. Mais comme cette détermination ne suffit pas en soi pour définir si l'employeur est une entreprise oeuvrant dans le secteur du débardage au sens de l'article 34, le Conseil a examiné le cadre spécifique de l'entreprise dans lequel ces activités ont été effectivement exercées, notamment à l'égard de sa finalité première et de son mode opérationnel propre comme entreprise de transport spécialisé, soit pour les démarquer comme activités autonomes, soit pour les rattacher de façon accessoire à ses activités habituelles.

Le Conseil a conclu que les activités de débardage auxquelles s'est livré l'employeur se démarquent des activités régulières et habituelles de ce dernier. À cause de leur rattachement direct au transport maritime, ces activités ne sont pas reliées de façon nécessaire à l'exploitation de son entreprise de transport intraprovincial.

Le Conseil s'est ensuite penché sur ce qu'il serait ici l'entreprise fédérale oeuvrant dans le secteur du débardage. Il s'est demandé si la portion de l'entreprise vouée aux activités de débardage constitue une «entreprise» au sens de la jurisprudence. Son statut d'«entreprise active» ou de «going concern» a été examiné pour déterminer si cette création de facto d'une entreprise de débardage au sein d'une entreprise de transport intraprovincial résultait d'un engagement de la part d'Équipements Bellemare Ltée de diversifier ses activités, ou s'il s'agissait plutôt d'une incursion reliée à un seul contrat dont la fin marquait en même temps la fin de ses activités de débardage.

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In the absence of clear evidence to this effect, the Board will not make a final determination as to whether or not Équipements Bellemare Ltée is engaged in longshoring in the geographical region involved and whether or not, it is bound as such by the certification and by the current collective agreement.

In the circumstances, it is incumbent upon the parties to bring to the Board's attention, within 15 days of this interim decision, any information that would allow it to determine if Équipements Bellemare Ltée still carries out, or intends to carry out, longshoring activities. The Board will then make a final determination on that issue.

En l'absence d'une preuve claire à cet égard, le Conseil ne tranche pas de façon définitive la question de savoir si Équipements Bellemare Ltée est un employeur engagé dans le secteur du débardage dans la région géographique en cause, ni si, à ce titre, il est liée par l'accréditation et la convention collective en vigueur.

Dans les circonstances, il revient aux parties en cause de porter à l'attention du Conseil, dans les 15 jours suivant la présente décision partielle, tout renseignement qui permettrait de déterminer si Équipements Bellemare Ltée est une entreprise qui se livre toujours, ou entend se livrer à des activités de débardage. Le Conseil statuera alors de façon définitive sur cette question.

Reasons for decision

Syndicat des débardeurs de Trois-Rivières,
Local 1375 (CUPE),

applicant,

and

Maritime Employers' Association and
Équipements Bellemare Ltée,

respondents.

Board File: 610-130
CCRT/CLRB Decision no. 1112
March 16, 1995

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Mr. François Bastien and Ms. Sarah E. FitzGerald, Members. A hearing was held on May 11 and 12, 1994, at Trois-Rivières.

Appearances

Mr. Claude Hétu, union advisor, accompanied by Mr. Fernand Cléricy, union advisor, for the Syndicat des débardeurs de Trois-Rivières, Local 1375 (CUPE); Messrs. John Coleman and Malcolm MacLeod, labour relations advisor, for the Maritime Employers' Association; Messrs. Rolland Forget and Claude Pellerin, manager of the Transportation Division, for Équipements Bellemare Ltée.

These reasons for decision were written by Mr. François Bastien, Member.

The question at issue is whether Équipements Bellemare Ltée (Bellemare) is bound by the certification order issued to the Syndicat des débardeurs de Trois-Rivières, Local 1375 (CUPE), and by the collective agreement entered into by the union, as certified bargaining agent, and the Maritime Employers' Association (MEA) in its capacity as employer representative of all the employers engaged in longshoring in the

geographical area in question. This is the crux of this referral to the Board under section 65 of the Code, which reads as follows:

"65. (1) Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for hearing and determination.

(2) The referral of any question to the Board pursuant to subsection (1) shall not operate to suspend any proceeding before an arbitrator or arbitration board unless the arbitrator or arbitration board decides that the nature of the question warrants a suspension of the proceeding or the Board directs the suspension of the proceeding."

I

THE PROCEEDINGS

In this referral made on June 8, 1993 under section 65 of the Code, the union asked the Board to declare:

- (a) that Bellemare is bound by the certification issued to CUPE because it began working in the longshoring industry in the geographical area consisting of the ports of Trois-Rivières and Bécancour;
- (b) that Bellemare is bound by the collective agreement entered into by the MEA and CUPE;
- (c) that the collective agreement entered into on December 8, 1992 by the union and the MEA on behalf of the employers engaged in

longshoring in this area covers longshoring work performed by Bellemare;

(d) that Bellemare must use the services of the employees covered by CUPE's certification.

According to the applicant, Bellemare's employees carried out longshoring work within the geographical boundaries of the ports of Trois-Rivières and Bécancour when they loaded shipments of cement powder aboard vessels for delivery to Mexico during 1993. This work should have been carried out normally by employees covered by CUPE's geographical certification. On June 2, 1993, the applicant grieved this matter; the grievance was referred to arbitrator Claude Lauzon. The applicant asked that pursuant to section 65, and before the grievance is heard the Board determine the identity of the parties bound by this certification.

II

THE CONTEXT

It is useful to relate briefly the main facts of the situation found in the port at the time of the referral, and with respect to which the Board must decide the matters at issue. As stated in the application, on June 12, 1992, the Board certified the union as bargaining agent for a unit of employees comprising:

"all employees involved in loading and unloading ships and other related duties for all employers in the longshoring industry in the geographic region comprised of the ports of Bécancour and Trois-Rivières."

(Quebec Ports Terminals Inc. et al. (1992), 89 di 153; and 93 CLLC 16,035 (CLRB no. 967), pages 192; and 14,276; emphasis added)

Unlike the situation in the other St. Lawrence ports covered by geographical certifications, in particular Montréal and Quebec, the persons carrying out checking activities in that area, i.e., those classified as checkers, are not covered by a separate certification certificate, but are included in the longshoremen's unit. Moreover, the Board, pursuant to section 34(3) of the Canada Labour Code, ordered in this same certification certificate the employers of the employees in that bargaining unit to choose collectively a representative. At the time, the only employers involved in longshoring in that area were:

- Quebec Ports Terminals Inc.,
- Moorings (Trois-Rivières) Ltd.,
- Compagnie d'Arrimage de Trois-Rivières,
- J.C. Malone and Company Limited,
- Les Élévateurs de Trois-Rivières, and
- Somavrac Inc.

These employers failed to agree on an employer representative. The Board therefore convened a hearing, on this question following which it appointed the MEA, pursuant to section 34(5) of the Code "as the employer representative of all the employers in the longshoring industry in the geographic region comprised of the ports of Trois-Rivières and Bécancour" (Quebec Ports Terminals Inc. et al. (1992), 89 di 194; and 93 CLLC 16,036 (CLRB no. 968)). Further to that decision, the union and the MEA entered into a collective agreement on December 8, 1992. That agreement defines, in particular in clauses 1.04, 1.05, 1.06 and 1.09(a), the union's jurisdiction with respect to loading and unloading ships and other related work in the ports of Trois-Rivières and Bécancour. Moreover, clause 1.09(b) expressly excludes from the union's jurisdiction the loading of liquid chemicals, an activity that counsel for Bellemare likened to the activity at issue here, namely, the transhipment of cement powder (Portland type) from pressurized tanker trucks.

On June 2, 1993, the union filed a grievance under that collective agreement, alleging that work performed between May 28 and June 1, 1993 by persons who were not members of the unit, in particular Bellemare employees, should have been performed by employees covered by the certification order.

III THE FACTS

Bellemare is a specialized transportation company that requires special equipment or vehicles, in particular pressurized tanker trucks, low bed trailers or articulated trailers in the case of wide-load transport.

Tanker transportation accounts for 30% of this company's total transportation activities, 95% of which is the transportation of Portland cement. Portland cement is ground cement whose texture is almost the same as flour. This cement is transported in airtight pressurized tanker trucks, a vital condition as the cement could solidify on contact with humidity or water. Its main customers for this type of transportation are St. Lawrence Cement, Lafarge and Ciment Québec. The cement comes from the cement factories they operate at Saint-Constant, Joliette and Beauport, and Saint-Basile respectively.

Whether a ready-mix producer or a ship's hold is involved, the method of delivery of this cement is the same. The procedure is as follows. The driver of the tanker truck first backs his vehicle up to the silo, in the case of the ready-mix producer, or to the holds, in the case of a ship, and connects his truck with the silo or the ship's hold by means of hoses. In most cases, the hoses belong to Bellemare; in some cases, however, the driver uses customer-owned tank hoses. Once this manoeuvre is completed, the driver activates his blower, i.e. a piece of equipment used to pressurize the tank, and by adjusting a number of valves, achieves the proper level of air pressure required to push the cement powder through the hose towards the silo or the

hold. When loading is completed, the driver reverses the procedure, i.e., depressurizes the tank, disconnects the hose and has someone sign the delivery receipt.

The circumstances that gave rise to the present dispute in the port of Trois-Rivières, involving Bellemare, can be summarized as follows. In the early months of 1993, Cimento Apasco, a Mexican company, approached St. Lawrence Cement to purchase cement. St. Lawrence Cement agreed, under the contract that was subsequently entered into, to deliver three shiploads of cement. Two additional shiploads were added to the initial order. Under the contract, the cement to be delivered to the Mexican customer would be hauled from St. Lawrence Cement's factory in Joliette to the ship's hold in the loading dock.

Guy Duchêne, St. Lawrence Cement's traffic manager, contacted Claude Pellerin, manager of Bellemare's transportation division, to discuss the specific conditions of the delivery by his company. St. Lawrence Cement was planning at that point to load the vessels at the port of Montréal. Following this discussion, during which Mr. Pellerin encouraged Mr. Duchêne to visit the Trois-Rivières/Bécancour port facilities, and other steps subsequently taken by Mr. Duchêne, St. Lawrence Cement entered into an agreement with Bellemare under which that company would deliver the cement from the Joliette cement factory to the ships' holds in the port of Trois-Rivières.

Guy Duchêne of St. Lawrence Cement also authorized the shipping agency J.C. Malone and Company of Trois-Rivières and its representative, shipping agent Jean-Guy Lahaye, to handle the marine transportation part of the contract. In that case, this involved the usual responsibilities of a shipping agent, namely, obtaining from and communicating to the recipients involved information on the movement of the ship or, more generally, the ship-to-shore communication through which a ship owner is kept informed periodically of the progress of the loading and of any expected delay.

Mr. LaHaye also obtained the mooring permits for the ships at dock 20 of the port of Trois-Rivières.

Bellemare had three responsibilities under the contract. First, it had to transport the cement by pressurized tanker truck from St. Lawrence Cement's cement factory in Joliette to the ships' holds. Second, it had to serve as St. Lawrence Cement's agent in co-ordinating and supervising from the loading dock the various loading activities. Claude Pellerin, the general manager of the company responsible for discharging these responsibilities, testified that the latter responsibility entailed ensuring that the loading proceeded according to plans and specifications. The third and final responsibility consisted, incidentally, in installing aboard the vessel the necessary loading equipment, in this case aluminium pipes, dust collectors and various connecting hoses, as well as closing the holds with manhole covers. Excluding the transportation activities per se, the value of Bellemare's agent contract was some \$25,000.

Bellemare employees' first task was the installation of pipes, hoses and dust collectors on the morning of May 28, 1993. That equipment was subsequently dismantled upon completion of the loading of the first shipment, but was reinstalled aboard the *Le Bardu* for the loading of the second shipment and remained there for the other shipments. In 1993, a total of five shipments of Portland cement were loaded under the contract let by St. Lawrence Cement to Bellemare. Of these five shipments, four were loaded aboard the *Le Bardu*, with the loading of the first shipment beginning on May 28, 1993. The *Flag Adrienne* was the other vessel used for the operation.

The first of the five shipments was loaded aboard the *Le Bardu*. That vessel anchored at dock 20 of the port of Trois-Rivières on the morning of May 28. A vessel of this kind can hold some 800 tanker truck loads and takes between 50 and 52 hours to load. Six or seven tankers trucks were used to transport the cement until loading was completed. The trucks belonged to Bellemare and to the following transportation companies to whom Bellemare subcontracted work: Transport Dupont, Transport

Super-Rapide, Transport Cabano, Transport Courchesne, Transport Malo, Transport Cascades, Ciment Perreault, Ciment Bourgeois and Ciment Delorme.

The loading procedure is as follows. Upon arrival at the dock, the tanker truck first backs up to the empty holds. The driver then connects the tank to the ship and pressurizes the tank through the use of a compressor installed aboard. The manpower required consists of Bellemare employees, and according to the testimony of its general manager, Mr. Pellerin, the work entails the following duties. First, the foreman ensures that the necessary equipment is installed aboard the vessel, and that the loading is carried out according to the weight and volume specifications of each hold. This information is given to the foreman by the ship's senior officer responsible for ensuring that the load is distributed securely between the holds. Then comes the signalman who controls the movement of the trucks on the dock. Finally, the checker makes sure that the delivery receipt is received and recorded. Two teams, consisting of the above three individuals, work 12-hours shifts in rotation.

For the loading of the first shipment aboard the *Le Bardu* in May 1993, two signalmen and two checkers, responsible for receiving and checking invoices listing the types and quantities of cement delivered, worked 12-hours shifts in rotation. General supervision duties were carried out by Claude Pellerin, Bellemare's traffic manager, on the day shift, and by Pierre Pellerin on the night shift. For subsequent shipments, one person performed the duties of signalman and of checker, but the foreman duties remained the same. Except for a summer student who was assigned for a short time to this operation, all personnel used by Bellemare to load the cement aboard the vessels were casual employees hired expressly to perform this contract.

Bulk cargo is by far the largest category of goods shipped through the port of Trois-Rivières/Bécancour. Alumina, coke, grain, clay, pitch and cement are some of the main goods transported. With regard to liquid products, they consist mainly of petroleum products, caustic products, liquid urea, calcium chloride and molasses. This

latter category of goods is transported by tanker. 1993 marked the first time that cement powder was shipped through the port of Trois-Rivières/Bécancour. However, Mr. Duchêne testified that this was not the first time that St. Lawrence Cement had shipped its cement by sea. It had done so, in the 1960s, through the port of Quebec to Manicouagan, using the same procedure and technology. At that time, its employees had worked on the dock processing the deliveries by tanker truck. On another occasion, in the early 1970s, the company carried out the same type of loading operation in the port of Montréal.

IV

DECISION

As we saw earlier, the first two findings sought by the union raise the question of whether Bellemare is bound, first, by the certification order and, second, by the collective agreement in force in the geographical area designated under the certification system established under section 34 of the Code. The final two findings, to the extent that they maintain that Bellemare's longshoring activities are covered by the collective agreement and should be carried out by members of the certified bargaining unit, raise instead the question of the consequences of an affirmative answer to the first question. In fact, the Board was asked to declare that the longshoring work and the workers required are governed by the collective agreement now in force. Furthermore, it should be noted that while all parties agree that the Board has jurisdiction to deal with the first two issues, there is no such unanimous agreement in the case of the final two issues. The respondent and the mis-en-cause argued that, should the Board conclude that Bellemare, or any other company engaged in longshoring, is in fact bound by the certification order and the collective agreement, the arbitrator responsible for interpreting the relevant clauses of the collective agreement would then have to deal with the questions raised by the last two findings sought by the applicant.

The Board must first decide whether Bellemare is involved in loading and unloading vessels and other related work in the geographical area consisting of the ports of Trois-Rivières and Bécancour, and hence covered by the union's certification certificate and bound by collective agreement that the union entered into with the MEA on December 8, 1992. Before dealing with this question, the Board must examine the nature of the activities which, according to the applicant, constitute longshoring and the specific corporate framework in which they are actually carried out. The Board will now analyze in detail both aspects of this question.

(a) Bellemare's Activities in the Port of Trois-Rivières in 1993

The activities that, according to the applicant, constitute longshoring are on the one hand those which, under the collective agreement, are carried out by signalmen, checkers and foremen. They were all carried out during the loading of vessels chartered to transport Portland cement under the contract entered into by St. Lawrence Cement and Bellemare. The related work expressly involve work associated with the installation of pipes, hoses and dust collectors aboard the *Le Bardu* and the installation of manhole covers on each hold.

Exactly what do these activities involve? Over the years, the Board has had to determine what constituted longshoring within the meaning of the Code. One of these decisions, Maritime Employers' Association (1981), 45 di 314 (CLRB no. 346), examined in detail the nature of longshoring and its constituent elements. Although this decision was the subject of a judicial review application, the Federal Court of Appeal, in Cargill Grain Company Limited, Gagnon and Boucher Division v. International Longshoremen's Association, Local 1739, et al. (1983), 51 N.R. 182 (F.C.A.), did not invalidate the scope of this definition, but only its application to the Gagnon and Boucher Division. The Board reaffirmed this definition and the principles governing its application in Halifax Offshore Terminal Services Limited et al. (1987), 71 di 157 (CLRB no. 651). In that decision, the Board reviewed its past decisions on

that question. See also Halifax Grain Elevator Limited (1989), 76 di 157 (CLRB no. 725); W.S. Anderson Co. Ltd. et al. (1984), 55 di 105; and 84 CLLC 16,023 (CLRB no. 454); and Maritime Employers' Association (1984), 56 di 162 (CLRB no. 470).

A brief review of these decisions reveals that the definition of longshoring adopted by the Board in Maritime Employers' Association (346), *supra*, at pages 345-346, definition inspired largely by the Supreme Court decision in Re Eastern Canada Stevedoring Company Limited, [1955] S.C.R. 529, is still appropriate in the instant case. The functions recognized as constituting longshoring are as follows:

"... the ones covering the handling and checking of merchandise from the hold of the ship to the doors of rail cars or tailboards of trucks and, inversely, from the rail cars or trucks to the hold of the ship, including the handling and checking of the said merchandise in the sheds. It also includes the operation and maintenance of the equipment used in the port for handling this merchandise. ..."

(Maritime Employers' Association (346), *supra*, page 346; emphasis added)

As the Board pointed out, the Federal Court of Appeal stated in Cargill Grain Company, *supra*, that this definition did not apply to that particular case. It held that the activities of the Gagnon and Boucher Division relating to the unloading of grain, to the extent that the unloaded grain had reached its destination by sea (maritime transport), were essentially connected with the grain business and not with maritime transport. They could not therefore be considered longshoring activities. Since that Federal Court of Appeal judgment, the Board has commented at length on the Court's analysis, in particular in Halifax Offshore Terminal Services Limited et al., *supra*, page 169; and Halifax Grain Elevator Limited, *supra*, pages 166-167. The latter decision is of particular interest because its analysis of the notion of longshoring and of the industry-wide certification system, as well as its examination of the activities

of a business whose primary and normal role is not longshoring, provides an interesting analogy with the instant case.

The evidence heard here, which was in no way challenged, reveals that, during the period in question, from May 28 to June 1, 1993, Bellemare employees carried out the duties of signalman, checker and foreman as generally understood. The evidence also revealed that all these duties directly related to the loading of shipments of cement aboard vessels for delivery to Mexico. Finally, there is also uncontested evidence that Bellemare employees installed aboard the *Le Bardu* the equipment (pipes, hoses and dust collectors) necessary to load Portland cement, as well as manhole covers on the holds once loading was completed. All this work was done under the direct control and supervision of Bellemare which, in its capacity as agent, had to ensure that all work was done "according to plans and specifications," to quote its traffic manager, Mr. Pellerin.

The Board wishes to make clear that the installation of the loading equipment, which counsel for the respondent likened to activities necessary to the ship's operation, such as the loading of heating oil by seamen, is related to longshoring if it directly involves the handling of cargo to be loaded aboard a vessel, and not, as is the case with heating oil, the ship's operation. That is the question at issue here. The inherent purpose of the equipment installed relates directly and solely to the particular nature of the goods to be transported and their efficient handling. In fact, the use of this equipment has no other purpose than to load efficiently and rapidly goods for delivery by sea. This notion is fully consistent with the definition of longshoring mentioned earlier.

Consequently, with the exception of the connections made by the driver of the tanker truck, which must, according to the respondent, be decided by an arbitrator having regard to the scope of the collective agreement, the activities in dispute do constitute longshoring within the meaning of the Code.

(b) Bellemare and Longshoring Activities

That determination, however, answers only in part the question of whether Bellemare is bound by the applicant's certification certificate and by the collective agreement. The longshoring activities are in fact carried out by a business in respect of which we must determine whether it is engaged in this industry in the geographical area in question (the Trois-Rivières/Bécancour area). Even though they are related, the questions of the nature of the activities and of the business that engages in them are nevertheless different, as the Federal Court of Appeal pointed out in Gagnon and Boucher Division, supra, at page 201.

This is important because the longshoring activities carried out by the business cannot, by themselves, be used to define the business as an employer engaged in longshoring. Loading and unloading vessels as well as storing and handling goods do not always constitute longshoring within the meaning of section 34 of the Code (Halifax Offshore Terminal Services Limited et al., supra). It is therefore important to place these longshoring activities in the specific context of the business involved, particularly as regards its primary purpose and its particular method of operation as a specialized transportation business, either to distinguish them as self-sufficient activities, or relate them incidentally to its regular activities.

Bellemare's regular and normal activities, as the evidence adduced revealed, clearly make it an intraprovincial transportation business, and one which, as such, comes under provincial jurisdiction. However, the question at issue is whether this business, in discharging its obligations as it did in accordance with the above-described terms and conditions, engaged in longshoring in the port area defined in the applicant's certification certificate. It is therefore useful to examine more closely the activities carried out in order to determine how they differ, in their design, their actual performance and their specific purpose, from the regular activities related to its primary role as an intraprovincial transportation business.

We must recognize, first, with respect to Bellemare, that, with the exception of the connecting manoeuvre carried out by the tanker truck driver, all activities related to loading or the immediate preparations therefor, such as the installation of dust collectors, are foreign to its normal method of operation as a specialized transportation company. This is amply confirmed, first, by the on-site and continuous presence of Claude Pellerin, Bellemare's traffic manager, during every phase of the operation to ensure that it was carried out in accordance with the requirements of the contract entered into with St. Lawrence Cement. This involvement would be hard to imagine if the activities in question were the business's regular or routine activities. Conversely, the need to ensure the successful performance of an activity in an industry that is completely new to this business more likely explains the presence of a manager at Claude Pellerin's level.

The exclusive use, for all intents and purposes, of casual employees hired expressly to carry out this activity again distinguishes it from Bellemare's regular activities. In this case, the persons involved were hired and their services used exclusively to carry out the loading activities aboard the vessels. Even though the foreman duties carried out by Claude and Pierre Pellerin, i.e. co-ordination on the dock, including directing the movement of trucks, resemble those regularly carried out off port premises, this in no way affects their purpose in the instant case. In this sense, this clearly applies to the longshoring duties mentioned in the collective agreement.

In the instant case, it is perfectly clear from the evidence that Bellemare's regular intraprovincial transportation activities did not include longshoring activities which would merely be secondary or incidental to its regular activities. On the contrary, the primary and sole purpose of these activities was loading goods for delivery by sea to Mexico. When Bellemare carries out this type of activity, it becomes one of the many links in the chain of maritime transport of which longshoring is an essential and integral part. The situation of the business here is therefore clearly different from that of the business in Maritime Employers' Association (346), supra, about which the

Federal Court had the following to say: "When these employees perform this work, the maritime transport has ended, since the goods have arrived at their destination and are in the possession of the recipient" (Gagnon and Boucher Division, supra, page 191). It also differs from the situation of Mobil Oil in Halifax Offshore Terminal Services Limited et al., supra, whose longshoring activities involved strictly its own goods to be delivered to the oil drilling rig. In the instant case, the work carried out by Bellemare employees was no different from the work that would have been carried out by employees of one of the other employers engaged in longshoring in the port area in question. As we stated earlier, the main elements of Bellemare's situation were more akin to the situation in Halifax Grain Elevator Limited, supra, about which the Board said that "by extending its business past the marine leg onto the decks and into the holds of the vessels, [Halifax Grain] has for the purposes of section 34 of the Code extended itself into the longshoring industry" (page 168).

What this essentially means is that as soon as Bellemare decided to serve as agent for St. Lawrence Cement, under the terms and conditions described earlier, and acquired the physical means and personnel to perform its loading contract, including making all necessary preparations, and eventually fulfilled all its obligations under that contract, it was engaging in longshoring. However, before deciding whether it is a business engaged in longshoring in the port area in question, within the meaning of section 34 of the Code, we must first determine the constitutional nature of its longshoring activities having regard to its regular activities as a specialized carrier working in an industry under provincial jurisdiction.

(c) The Constitutional Nature of Bellemare's Activities

In Gagnon and Boucher Division, supra, the Federal Court of Appeal developed a twofold test for determining whether longshoring activities come under federal jurisdiction and more particularly under the Code. The activities in question must directly relate to maritime transport, i.e. serve the actual purpose of maritime

transport, and not to a different activity such as grain storage, as was the case involving the Gagnon and Boucher Division. The Court held for that reason that the Gagnon and Boucher Division was a provincial work, undertaking or business. In the instant case, Bellemare's activities involving the loading contract that it had entered into with St. Lawrence Cement make sense only in the context of maritime transport, and their purpose has nothing to do with its activities as a specialized carrier. In that sense, the activities in question clearly meet the Court's first test with respect to the notion of longshoring.

The second test developed by the Federal Court pertains to the constitutional nature of a business that is said to come under federal jurisdiction because it carries out longshoring activities per se, when its normal or regular activities are of a different nature. For this purpose, we must define the particular constitutional status of the business to which the longshoring activities attach. The following comment by Justice Marceau clearly illustrates this test:

*"... This is not a case involving the regulation of a federal activity as an activity: it involves the regulation of labour relations between employers and employees of a federal work, undertaking or business, within the meaning of s. 108 of the Code, and if this undoubtedly does not involve a specific type of company or a definite corporate organization, as the **Northern Telecom** decision cited above notes, at least, it seems to me, it involves an employer-employee grouping, a certain entity the activity - or a large part of the activity - of which falls within federal jurisdiction. It should not be forgotten that s. 132 is part of Part V of the Code, the application of which is defined in s. 108. The order of the Board was made not to a transport business, but to the Gagnon and Boucher Division, and it is clear that the activities of the employees of Gagnon and Boucher Division do not substantially entail the operations of unloading a vessel falling within federal jurisdiction."*

(Gagnon and Boucher Division, *supra*, page 201)

We must first note that Bellemare's situation raises, constitutionally, a different problem from that dealt with in past decisions involving longshoring. In Maritime Employers' Association (346), supra, this difference resulted from the fact that the activities in question related, not to maritime transport, but essentially to the grain elevator and storage business, i.e. to Gagnon and Boucher Division's *raison d'être*. This is not at all the case here where Bellemare's activities, because they directly relate to maritime transport, constitute longshoring and not a activity required for the operation of its intraprovincial transportation business. That, however, was the case in Halifax Offshore Terminal Services Limited, supra, where the Board had decided that Mobil Oil employees' handling of goods did not constitute longshoring because it was necessary and directly related to the undertaking's main exploration activities. The Halifax Grain Elevator Limited case resembles the present case to the extent that the unloading activities did not have as their purpose the operation of the employer's grain elevator business, but constituted longshoring per se carried out for a third party. The federal nature of the business, i.e. a grain elevator, was not at issue. In that case, the question of the relationship of the activities recognized as longshoring to a business, whose primary and regular activities come under provincial jurisdiction, was not at issue, as it is in the instant case.

For this reason, before determining whether Bellemare is a business engaged in longshoring and therefore bound by the certification in force in the port area of Trois-Rivières/Bécancour, the Board must identify the federal work, undertaking or business whose employees are said to be subject to the Code (see Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115). The Gagnon and Boucher Division judgment summarizes as follows the constitutional rule that applies here:

"... Thus, in order for the Board in the case at bar to have authority to make, pursuant to this exceptional legislation, an order which could be applied to applicant, the Gagnon and Boucher Division, the latter necessarily, as a prerequisite, had to be a federal work,

undertaking or business (within the meaning of s. 108 [now s. 4]), the employees of which were employed in the longshoring industry (within the meaning of s. 132 [now s. 34]). ..."

(page 196)

In the instant case, the Board must determine which federal work, undertaking or business is engaged in longshoring in the port area covered by the multi-employer certification order. Is it the entire Bellemare business which, moreover, is acknowledged to be engaged principally, if not almost exclusively, in intraprovincial transport, or a severable part of the business which, to the extent that it carries out longshoring activities and is related to maritime transport, would come under federal jurisdiction?

The first scenario does not withstand scrutiny having regard to the facts of the present case. Bellemare's regular and normal activities, the use made of its regular work-force and its equipment provide ample proof that its role is that of provincial carrier. Moreover, the longshoring activities that are said to attach to Bellemare's business, to the extent that they are clearly separate, would virtually preclude their integration into the business as a whole to make it a federal work, undertaking or business. In fact, since the decision in Attorney-General for Ontario et al. v. Winner et al., [1954] 4 D.L.R. 657 (P.C.), a business is deemed to be federal, having regard to all its transportation activities, even though only a small part of this business's transportation activities constitute interprovincial traffic. However, this rule applies only where one and the same activity is carried out both provincially and interprovincially. In the instant case, the activities in question are longshoring and provincial transportation and are clearly distinct and separate. For this same reason, there can be no question here of a situation where a business under provincial jurisdiction is deemed to constitute a vital part of a core federal undertaking (Byers Transport Limited et al. (1986), 65 di 127; and 12 CLRBR (NS) 236 (CLRBR no. 571)).

In order for the second scenario to apply, the part of Bellemare's activities said to constitute a business engaged in longshoring would have to be severable constitutionally from the intraprovincial transport business (see in this regard J.C. Fibers Inc. (1994), 94 di 1 (CLRB no. 1057)). This of course would be the particular operational set-up which we examined and through which Bellemare acquired the material means and manpower to fulfil its loading obligations. However, does this operational set-up constitute, having regard to the circumstances and for the purposes of determining its constitutional nature, a business within the meaning of the case law?

To answer this question, we need not review all case law on the definition of business. For the purposes of this case, we need only refer to the Board's analysis of the case law in Larose-Paquette Autobus Inc. (1990), 80 di 105; and 14 CLRBR (2d) 132 (CLRB no. 792). In that decision, the Board rightly pointed out that the notion of business as defined by the courts in cases dealing with sales of businesses must be consistent with the notion of business as defined in section 2 of the Code. The constitutional scope of this concept must be the same in both cases, i.e. it requires that the business be a going concern. See in this regard the decision of the full Board in Terminus Maritime Inc. (1983), 50 di 178; and 83 CLLC 16,029 (CLRB no. 402), and more particularly on the notion of going concern in the context of a constitutional determination, the comments of the Supreme Court in Northern Telecom, *supra*. After completing its analysis, the Board adopted the following definition of business proposed by Justice Lesage in Mode Amazone et al., [1983] T.T. 227, page 231, and cited by Justice Beetz in U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048:

"[TRANSLATION] The undertaking consists in an organization of resources that together suffice for the pursuit, in whole or in part, of specific activities. These resources may, according to the circumstances, be limited to legal, technical, physical or abstract elements. Most often, particularly where there is no operation of the undertaking by a subcontractor, the undertaking may be said to be constituted when, because of a sufficient number of those components that permit the specific activities to be conducted or

carried out are present, one can conclude that the very foundations of the undertaking exist: in other words, when the undertaking may be described as a going concern. ..."

(page 1105)

In the present case, the operational set-up established by Bellemare for its loading activities with a view to ship goods by sea appears at first glance to meet the requirements of that definition. The nature of the physical and human resources used and their bringing together under the direction of a senior manager of the business are all elements that attest to the specificity of the longshoring business established and operated to perform the cement loading contract. It is difficult to imagine here that these elements would not be "the very foundations" that allow these longshoring activities to be conducted. In this regard, Bellemare's situation closely resembles that of Halifax Grain Elevator Limited, supra, concerning which the Board said that the business had engaged in longshoring when it had decided to expand its activities to include the loading of vessels.

However, the evidence in the instant case does not allow us to conclude with certainty that the role of a longshoring business that Bellemare had in fact assumed when it performed this contract is such that it permits "the specific activities to be conducted" by Bellemare. One has to wonder in fact whether this de facto creation of a longshoring business within an intraprovincial transportation company results from Bellemare's commitment to diversify, or constitutes a purely ad hoc incursion related solely to its contract with St. Lawrence Cement, the completion of which would also mark the end of Bellemare's longshoring activities.

This question is of some importance because, as Justice Beetz suggested in Bibeault, supra, the notion of business as a going concern refers to foundations "that permit the specific activities to be conducted or carried out." This notion implies in this regard

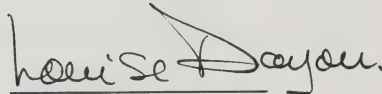
a degree of continuity over time, regardless of whether it is known whether the activities of the business as a going concern are in fact being carried out.

The "ongoing" nature of Bellemare's longshoring business is also important because of the special labour relations system provided by section 34 of the Code. While the Board does not intend to review here the basic characteristics of this system, on which it has had numerous opportunities to comment (see in particular Quebec Ports Terminals Inc. et al. (967) and Halifax Grain Elevator Limited, supra, pages 164-165), it still feels the need to point to one of the main features of such a multi-employer certification system, i.e. the creation and maintenance of a qualified labour pool and the related objectives of industrial peace and stability. Under such a system, longshoring becomes the sole prerogative of this labour pool and any business that is thinking of entering this industry must comply with the rules governing its operation. In the instant case, these rules are (a) the applicant's geographical certification and (b) the collective agreement entered into by the MEA and the applicant union.

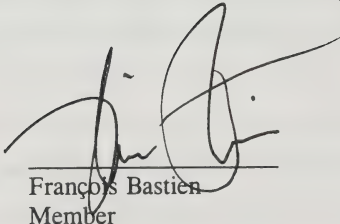
Before applying these rules to the longshoring part of Bellemare's business, the Board believes it must determine the precise nature of its involvement in this regulated industry. That was the approach it adopted in Halifax Grain Elevator Limited, supra, where, after identifying its activities in the Port of Halifax as longshoring, it did not issue an order allowing the employer involved to withdraw from this industry if it so desired. In our opinion, the present case calls for a similar approach. Either, because it carried out longshoring activities as they were described earlier, or because it plans to do so with a view to perform new loading contracts, Bellemare will continue to engage in longshoring in the designated port area; or decide that, after performing the loading contract at issue here, it no longer intends to carry out this activity. In the first case, Bellemare will become subject to the statutory labour relations system in force in the designated port area; in the latter case, the system will not apply because it chooses to remain a purely intraprovincial specialized transportation business.

For this reason, the Board makes no final determination in the present case. The information on which it could base this final determination is, insofar as it exists, known only to the parties. Should the parties (or one of them) decide that they should bring this information to the Board's attention, they will have 15 days to do so. The Board will then proceed with the final disposition of the present case. The Board appoints Ms. Suzanne Pichette, Regional Director of its Montréal office, or any other person she may designate, to follow up on the present decision.

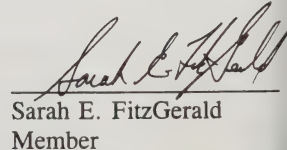
This is an interim decision under section 20(1) of the Code.



Louise Doyon
Vice-Chair



François Bastien
Member



Sarah E. FitzGerald
Member

information

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Summary

Gordon Rhodes, *complainant*, United Transportation Union, *respondent*, and Canadian National Railway Company, *employer*.

Board File: 745-4312
CLRB/CCRT Decision no. 1113
March 24, 1995

This case deals with a complaint alleging violation of section 37 of the Canada Labour Code (Part I - Industrial Relations).

The union argued the complaint was untimely pursuant to the strict 90-day time limit found in section 97(2) of the Code, saying that the complainant was aware of the circumstances giving rise to his complaint by mid-May 1992. Furthermore, the union stated that the complainant could have grieved at that time but had not done so. The complaint filed on August 31, 1992 would therefore be untimely.

The Board did not agree that the complaint was untimely. While the complainant had sought his union's advice by letter dated March 12, 1992, he had not received the union's answer when he voluntarily resigned in April 1992; and in May, he received and cashed a severance cheque. He had not been made aware until late June 1992 that the union did not support his contentions as to his severance entitlement. The Board found that the time should run from his receipt of the union's June letter.

Résumé

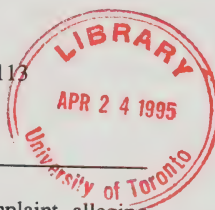
Gordon Rhodes, *plaignant*, Travailleurs unis des transports, *syndicat intimé*, et Compagnie des chemins de fer nationaux du Canada, *employeur*.

Dossier du Conseil: 745-4312
CLRB/CCRT Décision n° 1113
le 24 mars 1995

L'affaire porte sur une plainte alléguant violation de l'article 37 du Code canadien du travail (Partie I - Relations du travail).

Le syndicat prétend que la plainte n'est pas recevable en raison du délai rigoureux de 90 jours prévu au paragraphe 97(2) du Code. Il affirme que le plaignant a eu connaissance des circonstances ayant donné lieu à la plainte à la mi-mai 1992. De plus, il affirme que le plaignant aurait pu présenter un grief à ce moment-là, mais ne l'avait pas fait. La plainte du 31 août n'aurait donc pas été déposée dans le délai prévu.

Le Conseil n'accepte pas cet argument. Bien que le plaignant ait écrit à son syndicat le 12 mars 1992, afin de lui demander conseil, il n'avait toujours pas reçu de réponse au moment où il a quitté volontairement son emploi en avril 1992. En mai, il a reçu et encaissé un chèque d'indemnité de départ. Il n'a appris qu'à la fin juin 1992 que le syndicat n'appuyait pas ses prétentions concernant l'indemnité à laquelle il avait droit. Le Conseil estime que le délai devrait être calculé à partir du moment où le plaignant a reçu la lettre du syndicat en juin.



On the merits, the complainant alleged that the union failed to represent him properly with respect to his perceived severance entitlement. He alleged that the union had failed to represent him fairly in its negotiation of the applicable collective agreement. His interpretation of his severance entitlement pursuant to the agreement differed from both the union's and the employer's interpretation. The complainant had not actually requested the union to act on his behalf until July 10, 1992, after having attempted to negotiate directly with his employer, voluntarily resigned and cashed the severance cheque. When the union reviewed his severance arrangements, it agreed with the employer's interpretation of the agreement and realized a grievance would be untimely for those reasons, it declined to pursue the matter on his behalf.

In the circumstances, the Board could not find that the union's conduct was arbitrary, discriminatory or in bad faith. Accordingly, the complaint was dismissed.

Quant à la question du bien-fondé, plaignant allègue que le syndicat ne l'a pas représenté de façon juste en ce qui a trait à l'indemnité à laquelle il croyait avoir droit. Il allègue également que le syndicat ne l'a pas bien représenté dans les négociations de la convention collective applicable. Sa interprétation de l'indemnité à laquelle il avait droit en vertu de la convention était très différente de celles du syndicat et de l'employeur. Le plaignant n'a en fait demandé au syndicat de le représenter que le 10 juillet 1992, soit après avoir tenté de négocier directement avec son employeur, qui a volontairement son emploi et encaissé son chèque d'indemnité de départ. Lorsque le syndicat a passé en revue les dispositions relatives au départ du plaignant, il a souscrit à l'interprétation donnée à la convention par l'employeur et s'est rendu compte que le g... ne respecterait pas le délai prévu; pour ces raisons, le syndicat a refusé de donner suite à l'affaire au nom du plaignant.

Dans les circonstances, le Conseil ne peut juger que le syndicat a agi de façon arbitraire ou discriminatoire ou de mauvaise foi. Par conséquent, la plainte est rejetée.

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CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

LES MOTIFS DE DECISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Gordon Rhodes,

complainant,

and

United Transportation Union,

respondent,

and

Canadian National Railway Company,

employer.

Board File: 745-4312

Decision no. 1113

March 24, 1995

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members. Hearings were held on February 3 and 4, 1994, March 1 and 2, 1994 and June 27 and 28, 1994 in Vancouver.

Appearances

Mr. Joe Coutts, for the complainant;

Mr. Michael A. Church, for the respondent union; and

Mr. Andrew M. Rigg, for the employer.

These reasons for decision were written by Mr. Michael Eayrs, Member.

In a complaint filed with the Board on August 31, 1992, Gordon Rhodes alleges that his union, the United Transportation Union (the Union or UTU), violated section 37 of the Canada Labour Code by failing to represent him properly with respect to his

perceived entitlement prior to and following his voluntary termination of employment at Canadian National Railway Company (CN Rail).

The essence of Rhodes' complaint is that firstly, the UTU failed to provide him with timely and clear advice with respect to his service and seniority rights applicable to a mid-term agreement, thereby depriving him of certain benefits provided therein; secondly, the Union failed to negotiate the agreement in a fashion that clearly specified his severance entitlement on termination; and thirdly, it ultimately refused to file a grievance in support of his position with respect to his termination.

I

In addition to the investigating officer's detailed report and the parties' written submissions, the Board heard substantial detailed testimony from a number of witnesses. The relevant facts are summarized as follows.

Rhodes commenced employment with CN Rail in 1984 as a sectionman in its Western region covered by the applicable agreement between CN Rail and the Brotherhood of Maintenance of Way Employees (BMWE). He transferred to the Great Lakes region in April 1988, thereby establishing a new (BMWE) seniority date according to the agreement applicable to that region.

In October 1988, Rhodes became a brakeman/yardman in that same district, thereby establishing a corresponding UTU seniority date by virtue of his new position and the applicable UTU/CN Rail collective agreement. In April 1990, Rhodes applied for transfer to a UTU position in CN Rail's Western region. CN Rail approved his request, but Rhodes was not released until April 1991 when he became a brakeman/yardman in the Western region with a corresponding UTU seniority date in that region. He continued to work in various locations in that region (retaining his April 1991 UTU seniority date) until he resigned in April 1992, from CN Rail,

pursuant to a voluntary severance opportunity provided by a recently concluded memorandum of agreement between UTU and CN Rail Lines West.

The foregoing recitation of Rhodes' employment history illustrates that "seniority" as opposed to "service" is a function of classification, geographic region and collective agreement applicable to a CN Rail employee at any given time.

The memorandum of agreement pursuant to which Rhodes resigned is commonly referred to as the "conductor only agreement" (COA), and certain of its terms are key to Rhodes' complaint. The COA applicable to the Western region was negotiated between CN Rail and the UTU over a period of time following the conclusion of a similar agreement in the Great Lakes region (in which Rhodes held seniority prior to his transfer in April 1991). The COA effectively provides certain guarantees, benefits and severance opportunities in return for the "down-sizing" of train crews. Negotiations for the Western region COA commenced in the fall of 1991; an agreement in principle was reached in early 1992 and ratified in March 1992 with an implementation date of April 10, 1992. Prior to and throughout the process of negotiation and ratification, UTU representatives and members were well informed through bulletins and meetings of the terms of the agreement and its potential effects on employees who might be affected.

Rhodes participated in the ratification vote with respect to the agreement, although he apparently did not attend any of the information meetings held to explain its detailed terms. In February 1992, after learning of the COA (which by then was a "hot topic" in the region), Rhodes approached Charles Lewis, Local Chairperson of the UTU, and asked about his status following his transfer in April 1991 to the Western region. In a brief conversation, Lewis informed Rhodes that he was in effect a "new man", as of the date of his transfer to the region, with respect to seniority rights and the collective agreement presently applicable to him. Rhodes testified that he was "shocked" by this information and that he had spoken to "others" about his standing but had received no conclusive information.

On March 12, 1992, Rhodes wrote to John Armstrong, General Chairperson of the UTU for the Western region, requesting clarification on the possible effect of his "service date" versus "seniority date" in the event he opted for a "buyout" under the terms of the COA.

Armstrong testified that he recalled seeing the letter and that he made several unsuccessful attempts to call Rhodes at the Vancouver telephone number listed in the Union's data base. He also explained that he was extremely busy at the time with COA-related matters. Armstrong finally wrote to Rhodes on June 18, 1992, giving a detailed explanation of the Union's interpretation of Rhodes' situation. Attached to that letter were copies of correspondence outlining the Union's position with respect to other employees who had raised similar concerns about severance entitlements under the COA.

To maintain the chronology as it relates to Rhodes's complaint, we will return to the contents of the correspondence later.

II

As stated earlier, the COA provided certain "severance opportunities". These are contained in clause 15 of the agreement, are relevant to the instant complaint and are set forth below:

"Clause 15 SEVERANCE PAYMENT

15.1 Protected A and B freight employees at terminals where surplus employees exist who are not eligible for an early retirement opportunity pursuant to paragraph 14.1 of Clause 14 may voluntarily elect a lump sum severance payment of \$60,000.00 if employment with the Company is terminated within 60 days of the ratification of this Memorandum.

15.2 Employees with a seniority date as a brakeman subsequent to March 17, 1982 and prior to January 1, 1988 at terminals where surplus employees exist who are not eligible for an early retirement opportunity pursuant to paragraph 14.1 of Clause 14 may voluntarily elect a lump sum severance payment of \$55,000.00 if employment with the Company is terminated within 60 days of the ratification of this Memorandum.

15.3 Employees with a seniority date as a brakeman on or subsequent to January 1, 1988 and on or before June 29, 1990 at terminals where surplus employees exist who are not eligible for an early retirement opportunity pursuant to paragraph 14.1 of Clause 14 may voluntarily elect a lump sum severance payment of \$50,000.00 if employment with the Company is terminated within 60 days of the ratification of this Memorandum.

15.4 Employees who entered service subsequent to June 29, 1990 at terminals where surplus employees exist may voluntarily elect a lump sum severance payment of an amount equal to that employee's earnings in the previous 26 pay periods immediately preceding the signing of this Memorandum of Agreement but in no case to exceed \$25,000.00 if employment with the company is terminated within 60 days of the ratification of this Memorandum.

15.5 In the applications of paragraphs 15.1, 15.2 and 15.3 of this Memorandum of Agreement an additional \$15,000.00 lump sum severance payment will be paid if employment with the Company is terminated within 30 days of the ratification of this Memorandum.

15.6 Employees may elect at their option to receive the lump sum payment in two instalments over a 13 month period."

On April 2, 1992, Rhodes submitted his resignation on a form provided by CN Rail designed expressly for employees wishing to resign pursuant to clause 15 of the COA. On that form Rhodes indicated his request for severance payments totalling \$70,000.00 as provided for by clauses 15.2 and 15.5 (see above). He attached a lengthy "Supplement to Resignation Notice" to the form in which he outlined his version of his employment history and his interpretation of and justification for the severance payments claimed as opposed to the lesser entitlement provided by clause 15.4 of the COA. It is significant to note that Rhodes' "Supplement" contained (a) no reference to his resignation being conditional on CN Rail's acceptance of his version

of entitlement, (b) no copy to the UTU, and (c) no indication that the "supplement" document be considered as any form of grievance.

After submitting his resignation, Rhodes terminated his employment effective April 18, 1992. The severance form submitted was altered on April 14, 1992 by one Myron Becker of CN Rail to reflect Rhodes' entitlement to a severance allowance totalling \$25,000.00 in accordance with clause 15.4 of the COA, instead of the \$70,000.00 claimed. Following a conversation with Rhodes on April 21, 1992, the form was forwarded to CN Rail accounting for processing and payment.

The Board heard from Rhodes, his spouse, Becker and Becker's secretary about various telephone conversations concerning Rhodes' resignation and severance entitlement. According to the Rhodes' testimony, they were under the impression that for some time following submission of the resignation, Becker was "looking into the matter" and they were awaiting his response. Becker, on the other hand, testified that Rhodes was clearly informed of his reduced entitlement and offered an opportunity to rescind his resignation should that be unsatisfactory to him. In May 1992, Rhodes received, and subsequently cashed or deposited, a cheque from CN Rail which reflected his severance payment of \$25,000.00 (less tax deduction) in accordance with clause 15.4 of the COA.

III

As stated earlier, on June 18, 1992, General Chairperson Armstrong replied to Rhodes' letter of March 12. In that letter he explained the UTU's position concerning Rhodes' severance entitlement, and explained the Union's interpretation of the relevant provisions of the COA. Armstrong enclosed copies of correspondence dealing with other employees' similar concerns. The Union's interpretation and position were consistent throughout. In that same letter, Armstrong explained his attempts to reach Rhodes by telephone, noted that Rhodes had proceeded with his resignation, and invited Rhodes, should he disagree with the Union's interpretation of his entitlement

(which coincided with that of CN Rail), to appeal in accordance with the UTU Constitution.

By letter dated July 10, 1992, Rhodes responded to Armstrong, reiterating his version of his severance entitlement and his reasons therefore. He related his dealings with Becker and requested the Union to intercede on his behalf by obtaining a written decision from CN Rail on his severance, negotiating a fair severance agreement on his behalf, or, arranging his immediate reinstatement with full seniority and wage loss compensation.

In August 1992, Rhodes again spoke to Myron Becker of CN Rail who confirmed Rhodes' severance circumstances and entitlement as well as the fact that it was no longer open to Rhodes to rescind his voluntary termination.

Having received no response to his letter of July 10, Rhodes telephoned the UTU on August 18, 1992 to make enquiries. He talked with Vice-General Chairperson Mel Eldridge who said that the letter in question had not been received and requested that a copy be sent to him. Rhodes complied, and Eldridge received a copy of his letter shortly thereafter.

Having received the letter, the Union decided no grievance could be filed as it would be untimely according to the collective agreement and not in accordance with the Union's interpretation of the applicable terms of the COA. The instant complaint was filed with the Board on August 31, 1992.

IV

Section 37 of the Code reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation

of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

In argument, the Union raised, for the first time, the issue of the timeliness of the complaint. As that issue goes to the jurisdiction of the Board to determine this complaint on its merits, it must be addressed.

The strict time limit for bringing a complaint claiming violation of section 37 of the Code is set forth in section 97(2) of the Code:

"97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

Counsel for the Union argues that Rhodes was aware from various sources of his situation with respect to his severance entitlement before resigning from CN Rail and that Rhodes certainly knew, on receipt in May 1992, of his severance cheque, that he had not received the benefits applied for. Further, it was open to Rhodes to grieve at that time. He did not do so. Therefore, counsel argues, the 90-day time limit for filing the instant complaint should run from the appropriate date in mid-May 1992, and Rhodes' complaint filed on August 31, 1992 is untimely and should be dismissed as such.

With respect, we do not agree that the instant complaint is untimely. When Rhodes received his severance cheque, he was dealing directly with CN Rail, had not filed a grievance on his own behalf, nor had he requested the Union to do so. He was, in fact, dealing directly with his employer prior to receiving an answer to his written request of March 12, 1992 in which he sought the Union's advice.

It is well established in the Board's jurisprudence that in dealing with complaints of this nature, the Board's primary concern pertains to the conduct of the bargaining agent in representing its members.

It was not until he received Armstrong's letter of June 18, 1992 that Rhodes knew that the Union did not support his contentions with respect to his seniority, service and severance entitlement. It was at that time, and not before, that the 90-day "clock" started to run. We therefore find the instant complaint, filed on August 31, 1992, to be timely in accordance with section 97(2) and we shall entertain it on its merits.

V

The Board, having carefully analyzed all the evidence, reached the following conclusions.

In real terms, Rhodes' complaint turns on a difference of opinion between himself on the one hand, and the UTU and CN Rail on the other, on the application of the COA to his voluntary termination of employment and, thus, the amount of severance pay he received.

In Rhodes' opinion, his original UTU service date, prior to transferring from the Eastern to the Western region, should apply, entitling him to the severance pay claimed. Both the UTU and CN Rail disagree and have so informed him. Charles Lewis informed him of his status as a "new man" following his transfer to the Western region. Rhodes was also aware, from his conversation with other employees in a similar situation, of the Union's view of his status. We are reluctant to go into further detail as some or all of the "other" employees referred to have filed a related complaint with the Board (which at their request is in abeyance pending a decision in the instant case).

It was initially open to Rhodes to grieve his severance entitlement or rescind his termination. He did neither prior to receiving Armstrong's letter of June 18, 1992. Rhodes' letter of July 10, 1992 was the first indication that he wanted the Union to pursue matters on his behalf. We conclude that Rhodes simply decided to act on his own behalf and negotiated directly with CN Rail concerning his severance entitlement under the COA as he, not his union, perceived that entitlement.

With respect to Rhodes' claim that the UTU somehow failed to represent him properly in negotiating the terms of the COA, that matter has been dealt with conclusively by a somewhat differently constituted panel of the Board in Dan Reid et al. (1992), 90 di 58 (CLRB no. 972). In that case, which involved disputed but different negotiated benefits in the same COA at issue in the instant case, the Board had this to say:

"Looking at this complaint in the foregoing context, there is no evidence here that the UTU representatives who negotiated the Conductor Only Agreement in question acted improperly in any way. They undoubtedly acted in good faith at all times and they obviously had the interests of the bargaining unit as a whole at heart. The history of the negotiations as set out in the Board's Officer's report, which has not been disputed by the parties, shows a pattern of continuous communications throughout the whole process with the membership at large via Regional and Local Chairpersons and, the members were free to vote for or against the package at the time of ratification. As we already noted, a majority of the members of the UTU did vote for the package which gives them significant job security as well as the income guarantees and early retirement.

In the circumstances, it is difficult to imagine what else the union could have done to protect the interests of its members or how else it could have kept them informed as to what was happening, short of contacting every individual in the bargaining unit. Obviously, whatever it did, it was not going to be enough to satisfy Dan Reid et al. However, as we said, that is the reality of these situations; there is always the inevitable dissatisfied group. But mere dissatisfaction with the result of negotiations is not grounds to support a finding of a violation of section 37 of the Code, nor is a difference of opinion about what is being negotiated. These are all matters that are within the broad discretion enjoyed by the union in

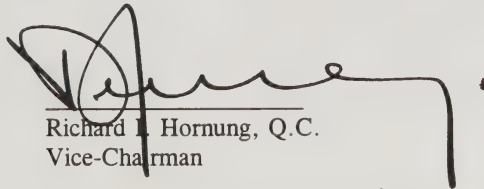
its role as the exclusive bargaining agent, to which this Board will continue to show deference."

(page 64)

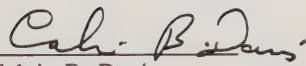
Finally, Rhodes complains that the UTU breached its duty by failing to file a grievance following his letter to Armstrong dated July 10, 1992. It is clear to us from Armstrong's letter to Rhodes of June 18, 1992, and its attachments, that the UTU had attempted, without success, to address the severance entitlement problem affecting him in negotiations for the COA. In the final analysis, after due consideration, and with full knowledge of the terms it had negotiated, the Union simply did not agree with Rhodes' position.

When Eldridge, of the UTU, finally told Rhodes that there was nothing more the UTU could do for him, the decision was based on the Union's considered opinion that a grievance would be inconsistent with the union's interpretation of the COA and untimely in accordance with the grievance procedure.

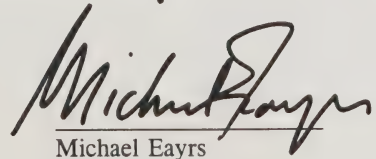
In the circumstances, we do not find that the Union acted in a manner that could be construed as arbitrary, discriminatory or in bad faith. Accordingly, the instant complaint is dismissed.



Richard L. Hornung, Q.C.
Vice-Chairman



Calvin B. Davis
Board Member



Michael Eayrs
Board Member

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Summary

Renate Rous et al., *applicants*, Western Canada Council of Teamsters, *respondent*, and Byers Transport Limited, *employer*.

Board File: 565-479
CLRB/CCRT Decision no. 1114
April 3, 1995

A group of employees filed an application pursuant to section 38 of the Canada Labour Code (Part I - Industrial Relations), for an order revoking the certification of the respondent trade union.

Although the application appears to be supported by a majority of the employees in the unit and appears to be timely (although the Board made no findings on those points), there is no collective agreement in force for the unit. Accordingly, by section 39(2), the Board has no jurisdiction to grant the application unless it is satisfied that the bargaining agent has failed to make a reasonable effort to enter into a collective agreement. The Board dismissed the application as it was not satisfied that such a failure had occurred.

Résumé

Renate Rous et autres, *requérants*, Western Canada Council of Teamsters, *intimé*, et Byers Transport Limited, *employeur*.

Dossier du Conseil: 565-479
CLRB/CCRT Décision n° 1114
le 3 avril 1995

Un groupe d'employés a présenté une demande en vertu de l'article 38 du Code canadien du travail (Partie I - Relations du travail) en vue de faire révoquer l'accréditation du syndicat intimé.

Bien que la demande semble être appuyée par la majorité des employés de l'unité et avoir été présentée dans les délais prescrits (même si le Conseil ne s'est pas prononcé à cet égard), aucune convention collective ne régit les employés visés. Par conséquent, le Conseil n'a pas compétence, aux termes du paragraphe 39(2), pour agréer la demande à moins d'être convaincu que l'agent négociateur n'a pas fait tout effort raisonnable pour conclure une convention collective. Le Conseil rejette la demande parce qu'il n'est pas convaincu que c'est le cas.



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CLRB REASONS FOR DECISION ARE NOW AVAILABLE
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LES MOTIFS DE DECISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Renate Rous et al.,

applicants,

and

Western Canada Council of Teamsters,

respondent,

and

Byers Transport Limited,

employer.

Board File: 565-479

CLRB/CCRT Decision no. 1114

April 3, 1995

The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Messrs. Calvin B. Davis and Michael Eayrs, Members. A hearing was held on March 6 and 7, 1995 at Calgary, Alberta.

Appearances

Renate Rous and Carol Davick, for the applicants;

M.D. McGown, Q.C., and R.A. Finley, for the respondent;

M.W. Hunter, for the employer.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

I

This is an application pursuant to section 38 of the Canada Labour Code for an order revoking the certification of the respondent trade union.

II

The applicants are employees of the employer and would appear to represent a majority of the employees in the bargaining unit. The respondent trade union was certified by this Board as bargaining agent for the unit of employees of which the applicants are members on July 2, 1993. This application was filed with the Board on August 4, 1994, and would appear to be timely, having regard to section 38(2)(b) of the Code, which provides that:

"38. (2) ...

(b) where no collective agreement applicable to the bargaining unit is in force [an application may be made] at any time after a period of one year from the date of certification of the trade union."

Although it is not necessary for the Board to hold a public hearing in a matter of this sort, the matter was set down for hearing, and evidence and argument heard, on the question of the application of section 39(2) of the Canada Labour Code to the circumstances of this case. At the hearing, while certain additional evidence was heard, the parties relied on the material portions of the investigating officer's report in this matter.

Section 39(2) of the Code is as follows:

"39. (2) Where no collective agreement applicable to a bargaining unit is in force, no order shall be made pursuant to paragraph (1)(a) in relation to the bargaining agent for the bargaining unit unless the Board is satisfied that the bargaining agent has failed to make a reasonable effort to enter into a collective agreement in relation to the bargaining unit."

While it is of course the right of employees to decide, in accordance with the majority principle, whether or not they wish to be represented by a bargaining agent or not,

the Canada Labour Code sets out the ways and times in which that right may be exercised. As well, the Code provides certain measures which protect the exercise of bargaining rights by bargaining agents, in the interest of promoting collective bargaining. Sections 38 and 39 are examples of such protection, and they are clearly applicable in the circumstances of the instant case.

Thus, while as we have said the application would appear to be supported by a majority of employees in the unit and would appear on its face to be timely (although we made no findings in that respect), it is the case that there is no collective agreement in force. Accordingly, by section 39(2) of the Code, this Board has no jurisdiction to grant this application unless it is "satisfied that the bargaining agent has failed to make a reasonable effort to enter into a collective agreement".

The Board has held, and we agree, that it is not necessary that a bargaining committee of employees be constituted; there was no such committee in this case. A two-fold test has been said to apply: (1) has the union bargained in good faith for the purpose of concluding a collective agreement? and (2) has it met its obligation to communicate with the employees in the bargaining unit? These tests are referred to in the case of Gary Robert et al.(1986), 64 di 191; 12 CLRBR (NS) 289; and 86 CLLC 16,030 (CLRB no. 566), although only the aspect of bargaining in good faith may be said to be a statutory requirement.

III

In the instant case, it is clear to us that the union's bargaining activities satisfy these tests. There is no allegation that bargaining was not carried out in good faith, and it is clear that bargaining was in fact carried out. Following the issuance of the Board's certificate on July 2, 1993, notice to bargain was issued by the union on July 12 of that year. Actual bargaining did not take place for some time, as the employer appears

to have been reluctant to participate in such bargaining while judicial review proceedings, which it had instituted, were under way. On September 29, 1993, the union applied to the Federal Mediation and Conciliation Service for the appointment of a conciliation officer, and on October 18, 1993, the parties were advised that an officer had been appointed. The parties met and commenced bargaining on January 12, 1994. Several negotiating sessions were held during the succeeding months, and agreement was reached between the parties on a number of issues. The present application was received by the Board on August 4, 1994, and it would appear that only one bargaining session has taken place since then, on September 1, 1994, which concluded when talks were broken off by the employer. It would appear that agreement has been reached on sixty-four of seventy-five articles advanced by the union.

It is also clear that the union has communicated with the members of the bargaining unit with respect to these negotiations. More than one meeting was held at which employees' wishes were canvassed, and on at least three occasions the union issued bulletins with respect to the progress of negotiations.

While it may be understandable, given the history of this particular case, that some might consider a vote of employees in respect of union representation to be desirable, the facts are that the question of representation has been determined, that the union is in fact the accredited bargaining agent, and that the provisions of the Code are clear: only if the Board is "satisfied that the bargaining agent has failed to make a reasonable effort to enter into a collective agreement", may it make the revocation order which is sought. Having considered all of the material before it, the Board is

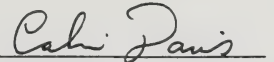
not satisfied that such failure has occurred. Accordingly, the application must be dismissed.



J.F.W. Weatherill
Chairman



Michael Eayrs
Member



Calvin Davis
Member

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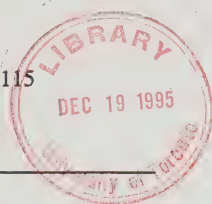
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Summary

Public Service Alliance of Canada, complainant, and Aéroports de Montréal, respondent.

Board File: 745-4833
CCRT/CLRB Decision no. 1115
April 13, 1995



This case deals with a complaint of unfair labour practice filed by the Public Service Alliance of Canada, alleging that Aéroports de Montréal violated section 94(1)(a) of the Code. The Alliance argued that the employer, by refusing to discuss the methods of granting annual leave at a conciliation session, by deciding unilaterally to implement a policy on this subject on that same day and by transmitting that policy directly to the employees affected, without its knowledge, violated section 94(1)(a) of the Code. The employer therefore ignored the union representatives, undermining the union's credibility and capacity to represent employees who later questioned the union's usefulness.

The Board considered the scope of section 94(1)(a) of the Code and confirmed its past decisions where it had said that that section prevented an employer from interfering in or hindering the exclusive right of a union to bargain collectively provided in section 36(1)(a) of the Code. The protection afforded by section 94(1)(a) is continuous and applies as long as the employer-bargaining agent relationship is governed by the Code.

Résumé

Alliance de la Fonction publique du Canada, plaignante, et Aéroports de Montréal, intimés.

Dossier du Conseil: 745-4833
CCRT/CLRB Décision n° 1115
Le 13 avril 1995

La présente décision porte sur une plainte de pratique déloyale de travail par laquelle l'Alliance de la Fonction publique du Canada allègue que la société Aéroports de Montréal a violé l'alinéa 94(1)a) du Code. L'Alliance prétend que l'employeur, en refusant de discuter des modalités d'attribution des congés annuels lors d'une séance de conciliation, en décidant de mettre unilatéralement en vigueur une politique à ce sujet le jour même et en la communiquant directement aux employés concernés, à son insu, a enfreint l'alinéa 94(1)a) du Code. L'employeur n'a donc pas tenu compte des représentants syndicaux, ce qui a eu pour effet de miner la crédibilité et la capacité de représentation du syndicat auprès des employés qui ont, par la suite, mis en doute l'utilité du syndicat.

Le Conseil a examiné la portée de l'alinéa 94(1)a) du Code et a confirmé ses décisions antérieures selon lesquelles cette disposition a pour effet d'empêcher un employeur d'entraver le droit exclusif du syndicat de négocier collectivement prévu à l'alinéa 36(1)a) du Code ou de s'y ingérer. La protection de l'alinéa 94(1)a) est de nature continue et s'applique tant et aussi longtemps que la relation entre un employeur et un agent négociateur est régie par le Code.

The Board reiterated the rule that although an employer can communicate with its employees, the contents and means used to exercise this right must not undermine the union's credibility and capacity to act as bargaining agent. In this respect, communications between employer and employees during collective bargaining will be closely examined.

The Board found that the employer, in acting as it did in the circumstances of the instant case, interfered in the union's exercising its right of representation, in violation of section 94(1)(a).

The Board, however decided that issuing an order in this case would not serve to promote the object of sound labour relations provided in the Code, an agreement having been reached between the parties.

Le Conseil a rappelé la règle que même l'employeur peut communiquer avec ses employés, le contenu et les modalités d'exercice de ce droit ne doivent pas miner la crédibilité et la capacité de représentation de l'agent négociateur. À cet égard, les communications de l'employeur avec les employés au moment de la négociation collective feront l'objet d'un examen approfondi.

Le Conseil a décidé que l'employeur, agissant comme il l'a fait, dans le contexte de la présente affaire, s'est ingéré dans l'exercice du droit de représentation du syndicat contrairement à l'alinéa 94(1)a).

Le Conseil a toutefois décidé que rendre l'ordonnance de redressement en l'instance servirait pas à promouvoir l'objectif de saines relations de travail prévu par le Code, l'entente étant intervenue entre les parties.

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MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Public Service Alliance of Canada,

complainant,

and

Aéroports de Montréal,

respondent.

Board File: 745-4833

CCRT/CLRB Decision no. 1115

April 13, 1995

The Board was composed of Ms. Louise Doyon, Vice-Chair, as well as Mr. François Bastien and Ms. Véronique L. Marleau, Members. Hearings were held on September 2 and November 23 and 24, 1994, at Montréal.

Appearances

Mr. James R.H. Duggan, assisted by Mr. Pierre Nadon, for the complainant; and Mr. André Sasseville, assisted by Mr. Rino Parent and Ms. Claudette Plouffe, for the respondent.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

The Board has before it a complaint of unfair labour practice filed by the Public Service Alliance of Canada (the union or PSAC) alleging that the employer, Aéroports de Montréal (the employer or ADM) violated section 94(1)(a) of the Code.

This section reads as follows:

"94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; ..."

II

PSAC has represented the firefighters and firefighter lieutenants employed by the employer at the Dorval and Mirabel fire stations since March 16, 1993 when it was certified in respect of the following unit:

"all firefighters and firefighter helpers of Aéroports de Montréal, excluding the fire chief and firefighter captains."

On September 3, 1993, the parties began bargaining with a view to renewing the collective agreement that expired on December 31, 1993. Bargaining sessions were held on September 9 and October 20 and 21, 1993. The employer cancelled the sessions scheduled for the week of December 13 to 17, 1993 on December 2, 1993 because it had not received all union demands. We will have more to say later about the bargaining process. The union requested the appointment of a conciliator on December 8, 1993. A number of conciliation sessions were held beginning in January 1994, including the May 25, 1994 session which gave rise to this complaint.

During that conciliation session, the union asked that the vacation leave scheduling policy be placed on the agenda. The union felt that this was a contentious and pressing issue and wanted to discuss it with the employer. The procedures for scheduling vacation leave had been a bone of contention between the parties for several months. Firefighters at the Dorval fire station had filed grievances over that matter, and the Public Service Staff Relations Board had rendered an arbitral award in this regard on May 5, 1994.

The employer objected to the placing of that issue on the agenda of the conciliation session. It felt that the vacation leave scheduling policy was an issue that concerned the application of a policy adopted under the old collective agreement and not an issue to be dealt with during conciliation. Moreover, that same day, the employer advised the Mirabel firefighters of a new vacation leave scheduling policy.

According to the union, the employer's refusal to discuss that question and its unilateral decision to implement a new vacation leave scheduling policy at the Mirabel fire station the very day of the conciliation session were contrary to the Code. The union argued that the employer violated section 94(1)(a) of the Code by ignoring its request to discuss the matter, and by communicating these new terms and conditions of employment directly to the firefighters, without its knowledge, while the parties were meeting specifically to negotiate the renewal of the collective agreement. By ignoring the union representatives, the employer undermined the union's credibility and ability to fulfil its representation function in the eyes of the employees of the bargaining unit, who subsequently questioned the union's usefulness.

III

The grievances filed in 1993 by the firefighters at the Dorval fire station against the vacation leave scheduling policy adopted by the employer, alleged that the preference given to captains with respect to this leave contravened their collective agreement. The captains belong to another bargaining unit, and are governed by a separate collective agreement. In his arbitral award of May 5, 1994, the arbitrator concluded that the employer's policy, whereby captains were always first to choose vacation leave, did not meet the requirement that the employer make a reasonable effort to grant firefighters their vacation leave, subject to operational needs. The arbitrator held that the employer had to find a more equitable system than the one in place, and he allowed the grievances.

For his part, Mr. Denis Marineau, president of the firefighters' union, proposed on May 18 to Messrs. Denis Cloutier and Jacques Cardinal, who occupied the position of Division Chief, Emergency Services, at the Dorval and Mirabel fire stations respectively, an interim policy governing the selection of vacation leave for the summer of 1994. Under the collective agreement, the selection had to be made before June 1. A copy of that proposal was sent to the directors of Air Services at Dorval and Mirabel and to Mr. Rino Parent, Director of Labour Relations and Safety and Health for ADM. The employer did not reply to Mr. Marineau's proposal. Instead, it posted at Dorval on May 19, a directive signed by Mr. Cloutier amending the vacation leave scheduling policy and proposing new procedures for selecting leave. According to the employer, the sole purpose of the new policy, which had not been discussed with, or communicated to the union before it was posted in the work place, was to comply with the arbitrator's decision and the employer's normal procedure when amending an internal policy.

On May 19, the captain in charge of the firefighters on duty at Dorval informed them, including Mr. Marineau, of the new policy. Some firefighters then asked Mr. Marineau whether the policy reflected the union's position. When he replied no, that he did not they asked him to have it amended thus questioning the union's usefulness if the employer could unilaterally decide terms and conditions of employment. On that same day, Mr. Marineau advised Messrs. Cloutier and Cardinal in writing that the union objected to the new policy as all firefighters were not given a reasonable choice, as required by the arbitral award. The employer did not reply to the May 19 letter, and there was no further communication between the parties on this subject until May 25.

Although the May 5 arbitral award primarily involved the Dorval fire station, it was clear to both parties that the decision would certainly affect the vacation leave policy at Mirabel. From the union's perspective, the consequences of that decision were quickly felt because its members had to select their vacation leave before June 1.

Moreover, the union had told its members that the selections made in May were temporary because the policy had to be reviewed in the light of the arbitral award. From the employer's perspective, Mr. Parent discussed the matter with Ms. Claudette Plouffe, Director of Air Services at Mirabel. She, however, did not foresee any consequences for Mirabel whose situation was different from that of Dorval. Following the posting of the policy at Dorval on May 19, Mr. Parent told her that they should re-examine the question because there should be only one policy for all firefighters, regardless of their place of work. It was agreed that the employer representatives would discuss the matter among themselves at the conciliation session on May 25. However, in Ms. Plouffe's opinion, this was a question that related to a policy adopted under the old collective agreement, and not one that should be addressed during conciliation. Furthermore, with the exception of 1992 when a shortage of personnel at Mirabel had required discussions with the union, the vacation leave policy had not been negotiated with the union. Ms. Plouffe was of the view that if the union wanted to negotiate that question, it had to do so at the bargaining table. She stated that she had not been informed of the Mirabel firefighters' dissatisfaction with the vacation leave policy, but she admitted having been aware of the union's position regarding the temporary nature of the vacation leave selections made in May. Moreover, she had told Mr. Cardinal to ignore the union's position on that question. Captain Normand Piché, who works at Mirabel, testified that the vacation leave policy was amended every year. In 1994, however, everyone expected that there would be changes to the policy, and hence a review of the selections already made in May under the old policy.

The question was discussed at the Mirabel fire station on May 24. Mr. Pierre Nadon, union vice-president and union steward at Mirabel, asked Mr. Cardinal, his superior, if a new vacation leave policy would be issued for 1994. Mr. Cardinal answered that there would not be because the situation at Mirabel did not pose a problem. Mr. Nadon told his superior that the firefighters were dissatisfied with the situation, and that grievances might very well be filed to make him aware of this. During the

afternoon, Mr. Nadon informed Captain Piché that he wanted to change his holidays, which Mr. Piché refused to let him do. A rather heated discussion ensued, with Mr. Piché accusing Mr. Nadon of trying to create a situation that would enable him to file a grievance. Finally, later that afternoon, Mr. Nadon learned from Mr. Cardinal that a vacation leave policy for the Mirabel firefighters would be issued the next day.

As soon as the conciliation session began on May 25, the union representatives informed the conciliator, Ms. Claire Tremblay, that they wanted to discuss the vacation leave policy, in particular the May 19 directive that applied to Dorval and the conditions that might apply at the Mirabel Airport.

Because the union felt that the employer's actions on May 19 did not comply with the arbitral award, and that the parties were meeting to negotiate the collective agreement, the union thought it normal that the matter be put on the agenda for discussion and that a way could be found to implement the arbitral award. The union favored this approach to others it had contemplated to oppose the manner in which the employer intended to implement the arbitral award, namely judicial review or the grievance procedure.

Ms. Tremblay advised the employer of the union's request at the beginning of the day. The employer, for its part, wanted to get on with the conciliation session, making clear that any disagreement over the implementation of the arbitral award was not negotiable, and that other remedies were available. Moreover, unlike the situation at Dorval, there was no problem scheduling vacation leave at Mirabel, and the employer had no plans to change the policy in effect at Mirabel. Mr. Parent stated in this regard that he was not aware of the events that took place at Mirabel on May 24.

The employer's reply was communicated to the union by the conciliator. Under pressure from the union, for which that question was a major irritant, the employer decided at the end of the morning to prepare a policy for Mirabel. It did not,

however, inform the union or the conciliator of its plan. Mr. Jacques Cardinal and Ms. Plouffe prepared a draft policy that was discussed with the other employer representatives present namely Mr. Rino Parent, Mr. Pierre Lanoix, Director of Air Services at Dorval, and Mr. Denis Cloutier. At 2:27 p.m., Ms. Plouffe faxed to Mirabel, from the offices of the Federal Mediation and Conciliation Service, a draft policy that her secretary was to finalize and return to her. Following revision, Mr. Cardinal signed the final text and faxed it, at 3:33 p.m., to Captain Normand Piché at Mirabel. The latter had received a telephone call from Mr. Cardinal instructing him to inform the members of his team and the other officers of the contents of the new policy, and to ask them to resubmit their vacation leave selection based on the new rules. That was done.

The employer did not inform the union representatives or the conciliator of that policy, did not discuss it with the union, and did not give them a copy before transmitting the policy to Mirabel. The union bargaining team learned of the existence of the new policy pertaining to Mirabel late in the afternoon on May 25. The Mirabel firefighters informed Pierre Nadon that a new vacation leave policy had been received by fax at Mirabel, from the Federal Mediation and Conciliation Service in Montréal on the afternoon of May 25. When it arrived, it was posted and communicated to the firefighters on duty by Captain Piché.

In the meantime, on May 25, the parties' spokespersons, Mr. Rino Parent and Mr. Luc David, union advisor for PSAC, met around 1:30 p.m., with the conciliator present. The meeting lasted about 30 minutes. Mr. David repeated to Mr. Parent that the union felt that the method of allocating vacation leave was a major stake, and that the May 19 policy did not comply with the arbitral award. Mr. Parent stated that the union could resort to other recourses at its disposal if it was not satisfied and that the employer had no intention to negotiate the arbitral award. Mr. David also asked him if there was a new vacation leave policy for the Mirabel firefighters and was told that

it was not available, but that the employer was trying to achieve consistency between Dorval and Mirabel.

Mr. Parent did not provide the union at that point, or later that day with the policy governing the Mirabel firefighters because he had already indicated, earlier in the day, that he would not negotiate the arbitral award and that he did not want to delay conciliation. Moreover, it was not the employer's practice to give the union a copy of its policies before posting, which was when the union normally saw them. He added, however, that had the policy been finalized when he met with Mr. David, or had he met with the union during the afternoon, or had the employer negotiated directly with the union that day, he would have given it a copy of the policy. In Ms. Plouffe's opinion, the new policy governing the Mirabel firefighters was not given to the union before it was transmitted to Mirabel because no one had asked her for it. She admitted, however, that nothing prevented her from giving the policy to the union, and that such a request might have been made that morning by Ms. Tremblay.

The union finally obtained a copy of the policy governing the Mirabel firefighters who gave it to the union representatives the following day, at the May 26 conciliation session. The firefighters who had travelled to the offices of the Federal Mediation and Conciliation Service in Montréal expressed surprise and frustration to the union representatives over the fact that the employer had adopted that policy without prior information or consultation with the union when parties were already present to attend a conciliation session.

IV

The parties held three face-to-face bargaining sessions in the fall of 1993. The union submitted part of its demands at the first session, and the employer asked that all union demands be given to it before the sessions scheduled for the week of December 13. The sessions held in September and October were devoted to negotiating an

agreement on overtime, which was signed on November 1, 1993. The application of that agreement caused problems because of its impact on the working conditions of the firefighter captains who had not ratified it. The matter was the subject of a collective grievance filed by the union on November 23.

On December 2, Mr. Rino Parent sent a letter to Mr. Luc David to cancel the bargaining sessions scheduled for the week of December 13, as the employer had yet to receive all union demands, contrary to what was agreed to between the parties. However, Mr. Parent was planning to discuss the overtime agreement with Mr. David on December 13.

According to Mr. David, the employer had in fact requested that all union demands be submitted in preparation for the December bargaining sessions, and Mr. Parent had reiterated the request in mid-November. Mr. David did not meet with Mr. Parent on December 13 to discuss the question of overtime. He told the Board that he had not interpreted Mr. Parent's proposal as an invitation to negotiate the problems arising from the overtime agreement of November 1, or at the very least to discuss them.

Following receipt of Mr. Parent's letter of December 2, the union requested the conciliation session of December 8.

DECISION

V

The Board must determine whether, in the circumstances of this case, the employer, by communicating directly to its employees its vacation leave policy for 1994-95, without first informing the union or discussing the policy with it, violated section 94(1)(a) of the Code. In order to prove such a violation, the complainant need not establish that the employer displayed anti-union animus. (See Canada Post Corporation (1994), as yet unreported CLRB decision no. 1095; and Canada Broadcasting

Corporation (1990), 83 di 102; and 91 CLLC 16,007 (CLRB no. 839).) Therefore, the Board does not have to determine whether the employer intended, in acting as it did, to undermine the union's ability to fulfil its representation function, but it must be satisfied that the employer's actions, having regard to the circumstances that existed at the time of the alleged events, did not undermine or interfere with the union's activities.

Section 94(1)(a) protects the fundamental right of association conferred by section 8 of the Code and the union's role in representing the employees in the bargaining unit. More specifically, it prohibits an employer from interfering in any way with or undermining the union's exclusive right to bargain conferred by section 36(1)(a) of the Code which reads as follows:

"36. (1) Where a trade union is certified as the bargaining agent for a bargaining unit,

(a) the trade union so certified has exclusive authority to bargain collectively on behalf of the employees in the bargaining unit; ..."

The protection afforded by section 94(1)(a) is continuous and applies so long as the relationship between an employer and a bargaining agent is governed by the Code. In Air Canada (1976), 18 di 66; and 77 CLLC 16,062 (CLRB no. 70), the Board held that this section affords a union continued protection, including during collective bargaining and even where the right to declare a strike or lockout has been acquired:

"Section 184(1) [now 94(1)] remains to offer continued protection against prohibited interference by an employer even subsequent to the formation of a trade union and during the course of its normal collective bargaining relationship with the employer.

...

There is nothing in the Code which would indicate any relaxation of the restraints contained in Section 184(1) during the period within

which either party to collective bargaining is free to engage in economic sanctions against the other."

(pages 78; and 322; see to the same effect Eastern Provincial Airways Limited (1983), 54 di 172; 5 CLRBR (NS) 368; and 84 CLLC 16,012 (CLRB no. 448))

In the union's view, the transmittal of the new vacation leave policy to Mirabel and its immediate communication to the firefighters, when the parties were participating in a conciliation session, without the employer's first informing the union or discussing the policy with it, undermine its role as the employees' exclusive representative.

In Sedpex Inc. (1988), 72 di 148 (CLRB no. 667), the Board summarized as follows its approach to how an employer's communications with the employees in a bargaining unit must be assessed:

"In interpreting and applying section 184(1)(a) over the years, the Board has had to draw, and has succeeded in drawing, a reasonably clear line between employer communications which constitute illegal interference with the formation or administration of a trade union or its representation of employees, and communications which are permissible. Obviously all communication cannot be barred; but equally obviously some communication by its very nature may be of a character that seeks to usurp the union's function or could deleteriously affect the union."

(page 159)

(See on this question Radio Futura Limitée (CKVL/CKOI) et al. (1992), 87 di 7; and 16 CLRBR (2d) 152 (CLRB no. 913); and more recently Canadian Broadcasting Corporation (1994), 95 CLLC 220-208 (CLRB no. 1102).)

Collective bargaining is both a special and strategic situation in which each party must communicate to the other its concerns and demands with respect to employees' terms

and conditions of employment. During this process, the employer must be circumspect in exercising its right to communicate directly with employees, in deference to the role of the bargaining agent chosen by its employees. In A.N. Shaw Restoration Ltd. [1978] 2 Can LRBR 214, the Ontario Labour Relations Board dealt with the implications of the exercise by the employer of its right to communicate with employees. Even though the Code does not expressly provide for the right of an employer to communicate directly with employees, that right has been recognized in past Board decisions, subject to limitations that are comparable with those enunciated by the Ontario Board:

"The existence of this well-established principle of exclusivity of bargaining rights means that employers must be circumspect when communicating with employees represented by a bargaining agent, especially when these communications occur during the course of negotiations. The need for circumspection on the part of employers, however, does not mean that all communications between employer and employees are prohibited. Section 56 of the Act, prohibiting employer interference with the formation, selection or administration of a trade union or the representation of employees by a trade union, expressly provides that this very general prohibition does not 'deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence'. Where communications occur between employer and employees during negotiations, the Board must draw a line dividing legitimate freedom of expression from illegal encroachments upon the union's exclusive right to bargain on behalf of employees. The line is not an easy one to find, and can only be discovered by asking whether such communications in reality represent an attempt to bargain directly with the employees. If employer communications can be characterized in this manner, they must be regarded as unduly influencing employees and, therefore, falling outside the protection provided to freedom of expression in section 56. Once outside this protected area, such communications can be characterized as a violation of section 59 of the Act, and also a violation of the duty to bargain in good faith if they serve to undermine the viability of the bargaining agent."

(page 219; emphasis added)

VI

How must the Board assess the reasons given by the employer to justify having communicated directly to the employees its vacation leave policy when their union representatives were trying to negotiate the contents of the policy at the bargaining table?

On May 25, 1993, the parties were engaged in bargaining and conciliation, and had been for some months, and relations between them during this period had not always been easy, as the evidence revealed. Moreover, the employer knew well before May 25 that the question of the impact of the arbitral award on the vacation leave allocation criteria was of serious concern to all parties. These are facts the Board must take into consideration, even though it does not have to decide whether the employer correctly or incorrectly interpreted the expired collective agreement or the arbitral award. However, it must determine whether the employer, in acting as it did in the circumstances of this case, interfered in union affairs, contrary to the Code.

The vacation leave allocation criteria was a serious bone of contention between the parties, and the May 4, 1994 arbitral award affecting the Dorval firefighters did not prescribe any binding and immediate remedy for the dispute that had given rise to the grievances. The arbitrator asked the employer to apply the collective agreement, without clarifying its meaning or scope, while stating that the previous policy was not in keeping with the collective agreement.

The May 19 policy pertaining to the Dorval firefighters was posted without regard to the proposal the union made on May 18, namely before the employer acted on the arbitral award. Other than the requirement that it make a reasonable effort, that award did not impose on the employer any obligation or restriction regarding the action to be taken to implement the said decision. Had it wanted to do so, the employer could certainly have communicated with the union on that matter, but it decided instead to

ignore the union's proposal. Moreover, it did not acknowledge receipt of either the proposal or the union's protest note of May 19. During this time, however, Mr. Parent knew that the arbitral award would have repercussions at Mirabel, and he agreed with Ms. Plouffe that the employer would discuss the matter at the conciliation sessions on May 25 and 26.

Furthermore, the employer ignored the union on May 25 when it refused or failed to deal openly with the union's request on the allocation of vacation leave for the Mirabel firefighters on the basis that the question should not be the subject of bargaining. If the question pertained to the uniform application of the arbitral award, it also could be put on the agenda, for the renewal of the collective agreement which the parties were trying to finalize. The union recognized that the employer had until then established vacation leave allocation criteria, under the collective agreement in force, and advised employees and the union of the policies in effect as the case may be. The reality, however, does not alter the fact that the union had made it very clear that it wanted to discuss with the employer through the re-negotiating of the collective agreement the repercussions of the arbitral award on the firefighters' terms and conditions of employment, and the action necessary to implement it.

If the employer intended to change the vacation leave policy when the union was asking to discuss it as part of the conciliation session, its reaction should not have given the impression or implied, as it did, that the union was unaware of a matter that had been a bone of contention for months. Moreover, in order to avoid discrediting the union in the eyes of its members, the employer, at the very least, had to be mindful of the bargaining agent when, on May 25, it communicated the policy to officials at Mirabel, and instructed them to immediately advise the firefighters on duty of the policy.

The Board does not believe that, in the circumstances of this case, the employer was justified to hide behind the past practice of determining vacation leave allocation

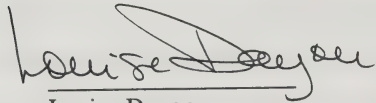
criteria, or to hold the view that the issue was not a matter for bargaining. To condone this behaviour would be tantamount to ignoring the bargaining and conciliation context in which the employer acted, and the ongoing dispute over a term and condition of employment.

The employer ignored the union at a critical point not only in collective bargaining, when the employees hold the bargaining agent's actions under close scrutiny, but also over an issue that had been on-going, one between the parties over a term and condition of employment, a dispute that the June 1 deadline merely exacerbated. The employer did not have to agree to the union's demands or claims, but cannot behave so as to undermine the union's ability to act and prevent it from fulfilling its responsibilities to its members, responsibilities that are protected by section 36(1)(a) of the Code, in particular its responsibility to take a position, on the employees' behalf, on the adoption of a term and condition of employment.

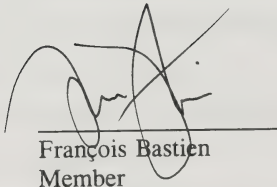
The Board concludes that the employer interfered with the union's exercise of its right of representation and violated section 94(1)(a) of the Code. It decides, however, that issuing a remedial order is not warranted in the instant case. The evidence persuaded the Board that the employer violated the Code, but it also revealed that the union, although it did not act unlawfully, did not always act diligently in responding to the employer's bargaining-related requests. The Board is referring here to the union's failure to provide, as it had agreed, all its demands in preparation for the bargaining sessions scheduled for December 1993, and the absence of a reply from the union, as bargaining agent, to the employer's offer to discuss problems relating to the application of the agreement on overtime. In short, it seems clear that during this period, each of the parties displayed, at one time or another, attitudes and behaviour that, while not necessarily contrary to the Code, do not appear to have facilitated the collective bargaining process. This was the parties' first collective bargaining experience since the Airport Transfer (Miscellaneous Matters) Act (S.C. 1992, c. 5) came into force. This process has now been completed with the conclusion of an

agreement between them. The Board therefore finds that there is no reason to order any remedy as its consequences would not necessarily further the Code's objective of sound labour relations.


For these reasons, the Board allows the complaint of unfair labour practice and declares that the employer violated section 94(1)(a) of the Code by acting as it did on May 4, 1994. However, for the reasons stated above, the Board does not order any remedy.



Louise Doyon
Vice-Chair



François Bastien
Member



Véronique L. Marleau
Member

information

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Summary

Ontario Northland Transportation Commission, *applicant*, and National Automobile, Aerospace, Transportation and General Workers Union of Canada, International Brotherhood of Electrical Workers, International Brotherhood of Firemen and Oilers, and International Association of Machinists and Aerospace Workers, *respondents*.

Board File: 530-2324
CLRB/CCRT Decision no. 1116
May 10, 1995

Résumé

Ontario Northland Transportation Commission, *requérante*, ainsi que le Syndicat national des travailleurs et travailleuses de l'automobile, de l'aérospatiale, du transport et autres du Canada, la Fraternité internationale des ouvriers en électricité, la Fraternité internationale des chauffeurs et huileurs et l'Association internationale des machinistes et des travailleurs de l'aérospatiale, *intimés*.

Dossier du Conseil: 530-2324
CLRB/CCRT Décision n° 1116
le 10 mai 1995

The applicant requests the Board, pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations), to review the bargaining units established in respect of its shopcraft employees, and to establish a single unit of such employees.

The application in respect of combining the bargaining units is allowed. Although the Board refuses to expand the scope of the review to one of a "global review" of all of the bargaining units of employees of the employer, it agrees to consolidate the present seven shopcraft bargaining units into one "industrial" unit based on the community of interest of employees and the need for efficiency in the employer's operations.

La requérante demande au Conseil, en vertu de l'article 18 du Code canadien du travail (Partie I - Relations du travail), de réviser la structure de négociation visant les employés de métiers d'ateliers et de créer une seule unité composée de ces employés.

La demande concernant le regroupement des unités de négociation est accueillie. Bien que le Conseil refuse de donner à cette révision une plus grande portée, soit celle de «révision globale» de toutes les unités composées des employés de l'employeur, il consent à regrouper les sept unités actuelles composées des employés de métiers d'ateliers en une seule unité «industrielle» compte tenu des intérêts communs des employés et du besoin d'efficacité sur le plan de l'exploitation de l'employeur.



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CLRB REASONS FOR DECISION ARE NOW AVAILABLE
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LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Ontario Northland Transportation Commission,

applicant,

and

National Automobile, Aerospace,
Transportation and General Workers Union of
Canada (CAW-Canada), International
Brotherhood of Electrical Workers (IBEW),
International Brotherhood of Firemen and Oilers
(IBF&O), and International Association of
Machinists (IAM),

respondents,

and

Mr. R. Barker et al.,

intervenor.

Board File: 530-2324
CLRB/CCRT Decision no. 1116
May 10, 1995

The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Ms. Mary Rozenberg and Ms. Véronique L. Marleau, Members. A hearing was held on April 5, 1995, at Toronto, Ontario.

Appearances

Messrs. John Coleman and J.D. Knox, for the applicant;

Messrs. L.N. Gottheil and B. Stevens, for the respondent CAW;

Mr. J. Hurtubise, for the respondent International Brotherhood of Electrical Workers;

Mr. M. Church, for the respondent International Brotherhood of Firemen and Oilers;

and

Mr. R. Barker, intervenor.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

I

In this application, received by the Board on August 2, 1994, the applicant Ontario Northland Transportation Commission requests the Board to review the bargaining units established in respect of its shopcraft employees, and to establish a single unit of such employees. An application of this sort is contemplated by section 18 of the Canada Labour Code.

II

There are at present seven units of employees established on craft, or the support of craft lines, and comprised of employees working on the maintenance and repair of locomotives and rolling stock and employed in main shops or line points. Until recently, seven different craft unions were bargaining agents for the employees in the seven units. Recently, the Board certified the CAW-Canada as bargaining agent for units which may briefly be described as units of carmen, sheet metal workers, plumbers and pipefitters and boilermakers and blacksmiths. Electricians continue to be represented by the IBEW, machinists by the IAM and labourers and engine attendants by the IBF&O.

The employer's application was supported by the CAW-Canada, and was opposed by the other three trade unions now representing employees in the bargaining units described. Mr. Barker, an experienced employee and an active unionist supported by a group of employees requested intervenor status for the purpose of asking that the Board expand the scope of the review to one of a "global review" of all of the bargaining units of employees of the applicant - or at least of all of its employees

involved in its railway operations - with a view to establishing a single bargaining unit. This request for a "global review" was opposed by all of the parties. It was the Board's view however, in the particular circumstances of this case, that it was appropriate to receive the representations of the intervenor on that question, and to grant status for that purpose to the group represented by Mr. Barker.

Following receipt of the officer's report on this matter, and of the parties' comments thereon, the Board set the matter down for hearing "with respect to the scope of the review that might be taken and with respect to the scope of the bargaining unit structure". The IAM advised that it would not attend the hearing, and that it relied on the representations already made. The Board has given consideration to these representations.

At the hearing, the Board first heard all parties present as well as the intervenor on the question of the overall scope of the review. No preliminary objections were raised, nor was there any question as to the Board's jurisdiction to deal with the matter and grant the relief requested. After taking time for consideration, the Board gave the following ruling with respect to the request for a "global review":

"The Board has considered the arguments made this morning, as well as the officer's report and the parties' written submissions thereon on the question whether or not this Board should, on its own motion, proceed to a "global review" of all bargaining units on Ontario Northland. The intervenor has asked the Board to consider such a review and to give consideration to a single bargaining unit of employees of the employer. We repeat now what we said earlier this morning, that we would not proceed further with the consideration of such a possibility without giving an opportunity to the bargaining agents representing employees in other bargaining units than those affected by the present application to make representations. We do not find it necessary to follow that course, since we do not consider that these are circumstances in which the exercise of our discretion under section 18 of the Code should be contemplated on a broader basis than that suggested by the applicant.

Railway collective bargaining structures are changing, but in our view they have not changed so drastically that the dramatic change of pattern which the intervenor suggests should be considered at this time. Accordingly, the parties are advised that any bargaining unit revisions which may result in this case will not be on a basis broader than that now suggested by the applicant employer."

After the Board informed the parties that it would then hear them on the question of the requested consolidation of the shopcraft bargaining units, counsel for the IBF&O withdrew, as did the intervenor.

III

The Board then heard the parties with respect to the requested consolidation of shopcraft bargaining units, and it considered the written submissions of all parties. In our view, the application should be granted, and the present seven shopcraft bargaining units consolidated into one such unit, of an "industrial" nature. There have recently been changes in bargaining structures on the largest railway operations in Canada, that is, on Canadian National, Canadian Pacific and VIA Rail, as well as on smaller lines, such as the Quebec North Shore & Labrador Railway. In each case, shopcraft workers have been included in a single bargaining unit, on industrial lines. The major factors which have been referred to in the decisions in those cases have been the community of interest of employees (including efficiencies in representation made possible by the establishment of a substantial membership base, and an enhanced likelihood of lateral mobility of employees), the need for efficiency in the employers' operations, something which the fragmentation of the work-force on craft lines was said to have inhibited, and the existence of jurisdictional disputes.

In Canadian Pacific Limited (1992), 88 di 126 (CLRB no. 944), the Board said:

"We have no doubt that, both as a general matter and in the particular circumstances of the railway shops, lateral mobility, and thus the long-term job security of employees, is more likely to increase where the bargaining unit is consolidated. As well, at both the local and national levels, the administration of a collective agreement has a better chance of being effective - and consistent - where a trade union's services can be provided in depth and from a larger resource base. ..."

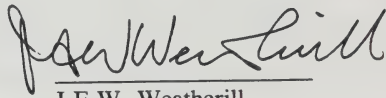
(page 136)

These considerations are even more compelling where (as was also the case on the Quebec North Shore & Labrador Railway (1992), 90 di 110; and 93 CLLC 16,020 (CLRB no. 978), the employment force is very much smaller than on the major lines. The seven present bargaining units, for a total shopcraft work-force (at the time of the hearing of this matter), of approximately 260 persons, vary in size from 110 (the carmen) to 4 (the sheet metal workers).

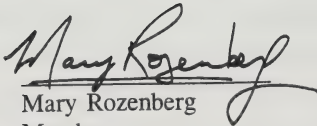
While collective bargaining may have been effectively carried on in common as between the several groups under the umbrella of the Association of Shop Unions (ASU), a fact which in itself further confirms the existence of a community of interest among them, the administration of the collective agreement remains the responsibility of the individual trade unions. In our view, the conclusion to which the consideration of such practical matters must lead is obvious.

Having regard to all of the circumstances, the Board finds that a combined bargaining unit of shopcraft and related employees (that is, a bargaining unit consisting of all employees now coming within the seven bargaining units represented by the respondent trade unions) is appropriate for collective bargaining and should replace the present 7 shopcraft units. The Board invites the submissions of the parties with respect to (1) the precise description of such unit; (2) the appropriateness of ordering a representation vote; and (3) the desire of each of the incumbent trade unions to


appear on the ballot, should the Board determine that it is appropriate to order a representation vote. Such submissions must be received by the Board within 15 calendar days of the date of this decision.



J.F.W. Weatherill
Chairman



Mary Rozenberg
Member



Véronique L. Marleau
Member

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Summary

General Teamsters, Local Union No., 362, *applicant*; Exalta Transport Corp.; Medalta Transport Corp.; and Medalta Distribution Services Ltd., *employers*.

Board Files: 555-3715
560-309

CLRB/CCRT Decision no. 1117
April 27, 1995



Résumé

Section locale 362 du syndicat des Teamsters (General Teamsters), *requérant*, et Exalta Transport Corp.; Medalta Transport Corp.; et Medalta Distribution Services Ltd., *employeurs*.

Dossiers du Conseil: 555-3715
560-309

CLRB/CCRT Décision n° 1117
le 27 avril 1995

These reasons deal with the question of the Board's jurisdiction to regulate the labour relations of two transportation companies, one of which was provincially regulated while the second, core operation, fell clearly within federal jurisdiction.

The union sought bargaining rights, via a certification application, for a unit which included employees of both companies.

The Board found that the companies in question were functionally and operationally integrated and inter-related to such an extent that, from a labour relations perspective, they formed a single operational enterprise or undertaking.

The Board reiterated its view that the operational reality of an enterprise, and not the commercial or corporate structure, dictates its constitutional character.

Les présents motifs traitent de la question de savoir si les relations de travail de deux compagnies, dont l'une de compétence provinciale, et l'autre, l'activité principale, nettement de compétence fédérale, sont du ressort du Conseil.

Le syndicat a présenté une demande en vue d'être accrédité à titre d'agent négociateur d'une unité composée d'employés des deux compagnies.

Selon le Conseil, les activités administratives et opérationnelles des deux compagnies sont à ce point intégrées et reliées entre elles que, du point de vue des relations de travail, elles ne constituent qu'une seule affaire ou entreprise.

Le Conseil a réitéré son opinion à ce sujet: ce sont les activités d'une entreprise, et non sa structure commerciale ou organisationnelle, qui déterminent si elle est de compétence fédérale ou provinciale.

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LES MOTIFS DE DECISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

General Teamsters, Local Union No. 362,

applicant,

and

Exalta Transport Corp.,

Medalta Transport Corp., and

Medalta Distribution Services Ltd.,

employers.

Board Files: 555-3715 and 560-309

CLRB/CCRT Decision no. 1117

April 27, 1995

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members. A hearing was held on November 16-17, 1994 at Calgary.

Appearances:

Mr. Murray D. McGown, Q.C., for the applicant union; and

Mr. David R. Laird, Q.C., for the employers.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

On February 23, 1994, the applicant filed two applications with the Board:

1. to be certified as the bargaining agent for:

"all company drivers employed with Medalta Transport Corp. and Exalta Transport Corp. excluding owner-operators"; and

2. seeking a declaration, pursuant to section 35, that Medalta Transport Corp. and Exalta Transport Corp. are a single employer for the purposes of the Code.

At the time, the applicant union was the certified bargaining agent for a group of employees of Medalta Transport Corp. (hereafter "Medita Transport") pursuant to certification order (#1571-91) issued on July 24, 1991, by the Alberta Labour Relations Board.

On February 24th, following the receipt of a letter from Exalta, described in section IV below, the applicant requested that its application be amended to include the name Medalta Distribution Services Ltd. (hereafter "Medita Distribution").

On April 19, 1994, the applicant applied to further amend its application to include "all company drivers and dock workers of the employer".

Accordingly, as at the date of the hearing, the union's certification application, as amended, was for the following unit:

"All company drivers and dock workers employed by Medalta Distribution Services Ltd. and Exalta Transport Corp. excluding owner-operators, mechanics, safety co-ordinator, administrative assistant, and terminal supervisors"

Counsel for the employer, as a preliminary matter, objected to the inclusion of the dock workers in the proposed unit insofar as, according to his information, some of the dock worker employees had filed withdrawal petitions subsequent to the certification application but prior to their being added to the proposed unit description.

The Board indicated that it would address that preliminary objection in this decision. However, in light of our order below, the determination of the employer's preliminary objection is moot.

II

There is no need to deal with the section 35 application in detail. In light of the fact that Medalta Distribution became subject to a certification order of the Alberta Labour Relations Board (certificate #215-94) on August 24, 1994, and, in light of the jurisprudential criteria established by the Board, (see Canadian Press et al. (1976), 13 di 39; [1976] 1 Can LRBR 354; and 76 CLLC 16,013 (CLRB no. 60), the union's application pursuant to section 35 is dismissed.

III

However, notwithstanding the dismissal of the section 35 application, the question remains whether the certification application, as amended, should be dealt with on the basis that the integrated operation of Medalta and Exalta, as going concerns, bring both companies within federal jurisdiction for labour relations purposes.

Insofar as Exalta and Medalta are both engaged in truck transportation businesses, the question of which jurisdiction their operations fall under depends on the nature of any extra-provincial activities that they may carry on and the nature of their relationship inter se.

On October 16, 1992, this Board rendered a decision (see Exalta Transport Corp. and/or Chief Transport Ltd. (1992), 90 di 21 (CLRB no. 964)) on an application by the union for certification of a unit which, for reasons that will be elaborated upon later, involves essentially the same entities for which application is made in the present case.

In his evidence, Mr. John Finn, the President of Exalta Transport Corporation, (hereafter "Exalta") acknowledged that the description of the corporate operations and the findings of fact made by the Board in that decision remain applicable in the present application.

In Exalta/Chief, supra,

"... the Board heard evidence from the President of all three companies, Mr. John Finn. Mr. Finn explained the corporate and operational relationship between Medalta, Exalta, and Chief, and described the evolution of the role played by Exalta and Chief in Medalta's business. He also related how the operations of these companies had developed over the past twenty years or so from the original parent company, Medicine Hat Moving and Storage. This background gave us a valuable insight into why these companies operate as they do; however, for our purposes there is no need to repeat this history; we need only look at the operations as they exist today.

In capsulized form, here are the constitutional facts before us. Medalta is in the business of truck transportation of less than a truckload (L.T.L.) of general freight predominantly within and along corridors connecting Calgary, Medicine Hat, Brooks, Lethbridge and Edmonton. At each of these locations Medalta operates terminal facilities where freight that is picked up locally at the aforesaid locations or, that comes in on the inter-city network, is sorted and dispatched to its final destination. Terminal operations such as these with warehouse employees are a necessary feature of L.T.L. trucking. Medalta also employs pick up and delivery drivers (P & D). These warehouse employees and the P & D drivers are represented by the Teamsters by virtue of a provincial certification order issued by the Alberta Labour Relations Board back when the business was known as Medicine Hat Moving and Storage.

Medalta does not operate over the road, nor does it have any running rights outside the Province of Alberta. This aspect of its business is reserved for Exalta which, incidentally, only became fully operational late in 1991. All of Medalta's over-the-road (between terminals) and extra-provincial work is contracted to Exalta which hauls strictly full loads of general freight (F.T.L.). Apparently, this hiving off of F.T.L. operations to a separate related company is a common practice now in the de-regulated trucking industry.

Exalta is authorized to transport full loads within Alberta and into British Columbia and Saskatchewan. It also has the necessary running rights from the Interstate Commerce Commission (I.C.C.) to transport goods into Montana. However, Exalta has no trucks and no drivers. All it possesses are the running authorities and some sixty or so trailers. It has no staff and no payroll whatsoever. All of its administrative work is done by Medalta.

This is where Chief comes into the picture. Chief is a tractor service company. It provides tractors and drivers to Exalta. It also supplies tractors to Medalta for its local P & D work. These tractors operate under Medalta and Exalta's running rights. In fact, what really happens is that Chief's half dozen or so tractors are used during the day to supplement Medalta's fleet for P & D work where they are driven by Medalta drivers. These same tractors are then used at night to haul Exalta trailers over the road between Medalta terminals. When so used, they are driven by Chief drivers. These drivers are hired by Chief and paid by Chief, however, they are dispatched for these purposes by Medalta's terminal managers. On occasions, Chief tractors haul Exalta trailers out of Alberta into British Columbia, Saskatchewan, and Montana.

...

Clearly, Medalta and Chief in their own right are not authorized to nor do they operate outside Alberta. Only Exalta ventures beyond the provincial boundary. According to the documentation before us, notwithstanding that Exalta holds itself out as an extra-provincial carrier, it operates as such only on a sporadic and irregular basis.

Prior to April 1992, there certainly were signs of what appeared on its face to be consistent extra-provincial activities; however, when analyzed we have concluded that it does not meet the test of regular and continuous." ...

(pages 23-25)

The Board, after reviewing all of the facts concluded that:

"... what we have here, regardless of the corporate structures, is a single integrated transportation undertaking. It is also clear that the core functions of this undertaking are those of Medalta which operates exclusively within the bounds of the Province of Alberta. The two subsidiary

companies, Exalta and Chief are, without question, integral parts of this whole operation.

...

The reality of this situation is that Medalta, Chief, and Exalta are a single integrated intra-provincial transportation undertaking which cannot, in the present circumstances, be transformed into a federal undertaking by virtue of the extra-provincial facet of the operations. In our view, the intermittent on-demand nature of the extra-provincial work here is not of the regular and continuous nature that is required to oust the primary presumption of provincial competence over labour relations."

(page 26; emphasis added)

It is clear, from a review of the Exalta/Chief decision, that had Exalta operated extra-provincially on a regular and continuous basis so as to bring it within federal jurisdiction, the Board would have concluded, on the facts enunciated, that the integrated family of corporations that was Medalta, Exalta, and Chief, fell within federal jurisdiction.

We must therefore examine what has changed in the "single integrated transportation undertaking" since the Board's decision in Exalta/Chief, supra.

IV

On January 3, 1994, Exalta wrote to all of its employees as follows:

"As you are all no doubt aware, Exalta Transport is offering daily scheduled service to Maple Creek, Gull Lake, and Swift Current, in Saskatchewan. We also have two round trip schedules a week from Calgary to Saskatoon and back, to Medicine Hat and Lethbridge. As a result, we no longer qualify as a provincial company and we now are considered to be a federal undertaking. ..."

As a consequence, the union, in light of the Board's findings in Exalta/Chief above, brought the present certification application.

However, on the day that the union's application was filed with the Board, Medalta Transport sent a further letter, dated February 23, 1994 (Exhibit 39), advising all of its employees that:

"At the end of February, Medalta Transport Corp. will cease operations.

...

A new company has been formed, Medalta Distribution Services Ltd., that will offer cartage service to customers in Calgary and Medicine Hat. Several customers have already been secured, the major one being Medalta Transport Corp.

All employees of Medalta Transport Corp. will be offered employment by the new company, on the same terms and conditions that now exist. If you have any questions, ask your Local Manager, John Beaudoin in Calgary or Terry Sehn in Medicine Hat for more information." ...

Thereafter, Medalta Distribution essentially took over the pick-up and delivery operations of Medalta Transport, including all of Transport's employees.

It is important, therefore, to review what the functional and operational relationship was with respect to Medalta Distribution and Exalta when the proverbial "music stopped" following the various corporate shuffles and new contractual relationships that surfaced.

John Finn testified that, although at the time of the Board's earlier determination he was President of all three companies - Exalta, Medalta, and Chief - he ceased to be the President of Medalta Transport in November 1993. His father, Frank Finn, replaced him as President of Medalta Transport. Thereafter, Frank Finn became the President of Medalta Distribution, the "new" company which would eventually replace Medalta Transport.

In January of 1993, the company known as Chief Transport, which had been such an integral part of the corporate family when the Board rendered its decision in Exalta/Chief, supra, was, according to Finn, "folded into" Exalta. Employees of Chief became Employees of Exalta, and its capital assets were either transferred directly, or are presently leased, to Exalta.

In its decision in Exalta/Chief, supra, the Board concluded from the evidence of John Finn that:

"...it was not the intention of Medalta to compete seriously in the extra-provincial market through Exalta."

(page 25)

However, beginning almost immediately following that Board determination, Exalta began to expand its Alberta operation. Within approximately one year it was operating out of Edmonton, Calgary, Lethbridge, Brooks, Medicine Hat and finally, with daily extra-provincial operating runs to Saskatoon and Swift Current, Saskatchewan.

Currently, the cartage work for Exalta, in Edmonton, is done by Central Carriers. In Calgary and Medicine Hat (Exhibit 31) the cartage work is done by Medalta Distribution - Lethbridge and Brooks remain Exalta operations and it does all its own general freight work.

In Calgary, Medalta Distribution rents space from Exalta. In Medicine Hat, the building out of which both companies operate is owned by Medalta and space is leased to Exalta. Medalta Distribution leases office space and services as well as equipment from Exalta (Exhibits 32 and 33).

That the Corporations - Medalta Distribution and Exalta - are integral and interrelated is really without question from our point of view. In reaching that conclusion we have considered, inter alia, the following facts:

1. Medalta Distribution Services, before it became operational, was registered as an Alberta numbered company, no. 527558. A review of the records of that company show that prior to it assuming its numerical designation, it had been the same Chief Transport Inc. referred to in the Board's Exalta/Chief decision no. 964. When the company was registered as Chief Transport Inc. it was owned 100% by Exalta Transport Inc.
2. Although all of the assets of Chief Transport Inc. were "folded into" Exalta Transport Corp., the "empty" shell company, which was Chief, reverted to a numbered designation and has since become Medalta Distribution Services Inc..
3. The letterhead of each of the companies show that Medalta Distribution Services, Exalta Transport Corp., and Southeast Management Services Ltd. (see paragraph 15 below) all have as their address the head office of Exalta Transport Corp. being 9816-52nd Street S.E., in Calgary, Alberta. Each of them share the same fax line, (403) 531-2579. Although their phone numbers differ, the phone lines run to the same Exalta office space and are answered by essentially the same people.
3. Similarly, Medalta, Exalta and Southeast Management Services all operate with the same mailing address in Medicine Hat and utilize the same telephone answering process as described above for Calgary.
4. At the Calgary terminal, all of the Medalta Transport employees became Medalta Distribution employees after February 28, 1994.

5. The same thing happened in Medicine Hat.
6. The servicing of both Medalta and Exalta vehicles is done at the Exalta service shop in Calgary by Exalta employees. On rare occasions, when the shop is unable to accommodate the work to be done, the repair work is sent out to independent service companies and then only with the approval of John Finn.
7. Both Medalta Distribution and Exalta use the same chartered bank.
8. Medalta Distribution and Exalta share the same freight manifest forms and the same bills of lading (e.g.: Exhibit 54).
9. The corporations exchange and interchange vehicles between them as meets their purpose.
10. The management personnel that directed the operations of Medalta Transport now do the same work for Medalta Distribution or Exalta.

The Terminal Manager in Calgary is John Beaudoin. Previously, he had been the Terminal Manager for Medalta Transport until March 1, 1994; thereafter, he became the Terminal Manager for Medalta Distribution.

Robert D. Schank became the General Manager of Exalta in Medicine Hat on March 1, 1994. Prior to March 1, 1994, he was the General Manager of Chief and then Medalta Transport.

11. The employees of the two companies work hand in hand and side by side. If a prospective customer were to phone either of the Exalta or Medalta phone numbers in Calgary, with a view to arranging inter-provincial transportation, the same operational process, set out below, would take place.

In evidence, Mr. Beaudoin agreed to the following scenario with respect to a pick-up and delivery call made to the Calgary office:

- (a) If the call was made on the Medalta line, (the message might well, in certain circumstances be taken by Exalta employees, and be passed on to the Medalta dispatcher) the Medalta dispatcher would send out a truck with a Medalta Distribution driver. The delivery and pick-up would be done with a Medalta tractor and an Exalta trailer. The goods would then be taken to the terminal owned by Exalta where Exalta employees would unload it and put it on an Exalta unit.
 - (b) If the call came in on the Exalta line, he would answer the call and would send out a vehicle. The same driver and the same vehicle would come out as did with the Medalta call. The vehicle would have a Medalta Distribution driver and a mix of Exalta and Medalta equipment. Again, the goods would be taken to the Exalta terminal and be handled in the same fashion as if the call came in on the Medalta line described above.
- 12. The radios on which all of the Medalta and Exalta trucks operate and are dispatched are supplied by Exalta.
 - 13. According to Beaudoin, 80% of the shipping work Medalta Distribution does involves its connection to Exalta.
 - 14. Both Medalta and Exalta have dock persons on duty at night who assist each other if necessary.
 - 15. In addition to the inter-relationship between Medalta Distribution Services and Exalta Transport Corp., John Finn established another company, Southeast Management Services Inc., on January 1, 1993. With the exception of a negligible amount of bookkeeping/consulting work that it does for an arms-length

company, Southeast Management Services Ltd. does all of the accounting/bookkeeping services, including payroll, accounts payable, accounts receivable and preparation of monthly financial statements for both Exalta and Medalta Distribution (Exhibits 36 and 37). Providing the services described for these two companies is virtually Southeast Management's raison d'être.

V

As indicated, in Exalta/Chief, supra, the Board concluded that:

" Based on (the) facts, which are for the most part undisputed, what we have here, regardless of the corporate structures, is a single integrated transportation undertaking. "

(page 26)

Essentially, what has changed in the scenario described by the Board in its 1992 decision no. 964? John Finn resigned as the President of Medalta Transportation Corp. to be replaced by his father, Frank Finn. The remaining corporate officers did not change. Exalta, contrary to John Finn's evidence at the hearing in Exalta/Chief, supra, dramatically expanded its operations in the federal sphere and is now clearly a federal undertaking with regular and continuous runs into Saskatchewan and the U.S.A.. The assets of Chief Transport and its employees have been wound into Exalta. The corporate entity which was Chief has now become Medalta Distribution. Medalta Distribution replaced Medalta Transport as the pick-up and delivery portion of what was then, and clearly in our view remains now, one integrated, inter-related family group of corporations.

It is well established that the corporate metamorphosis through which these companies went, does not dictate their constitutional character for labour relations purposes:

"There is, of course, nothing wrong with businesses structuring themselves in any manner that suits their particular needs; however, when it comes to determining constitutional jurisdiction we have to look at the reality of the situation, not the commercial costumes worn by the entities involved:

Underlying many of the arguments is an unjustified assumption that by choosing a particular corporate form the various players can control the determination of the constitutional issue. This Court has made it clear in this area of constitutional law that the reality of the situation is determinative, not the commercial costume worn by the entities involved."

(Alberta Government Telephones v. Canadian Radio-Television and Telecommunications Commission and CNCP Telecommunications, [1989] 2 S.C.R. 225 at page 263; emphasis added)

As indicated by the B.C. Board in Arrow Transfer Co. Ltd. et al., [1974] 1 Can LRBR 29 at pages 34-35:

"... In each case the judgement is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship."

The above passage was relied on by Dickson, J. of the Supreme Court of Canada in Northern Telecom Limited v. Communications Workers of Canada, [1980] 1 S.C.R. 115 at pages 134-35 when stressing the importance, in determining constitutional jurisdiction, of examining the practical integration of the various corporate activities as well as their inherent interdependence and the physical and operational connection between them. (See also Economy Carriers Limited et al. (1991), 86 di 209 (CLRB no. 910); and Télévision Saint-Maurice Inc. (1990), 83 di 179; 15 CLRBR (2d) 81; and 91 CLLC 16,041 (CLRB no. 841)).

Although Medalta Distribution and Exalta have, from a corporate structural perspective, been established as separate corporations and separate employers; from

a constitutional labour relations perspective, they are a single integrated transportation enterprise.

As reflected in the facts set out earlier, there is an apparent and real integration of managerial direction and employee functions - as well as facilities and company equipment - with respect to all the operational transportation functions served by both companies. This includes, inter alia, the dispatch of trucks and the pick up, transfer and delivery of customer goods. They share the same employees, equipment, facilities and financial institutions; and, through Southeast Management, the same administrative, financial, accounting/bookkeeping, and payroll services.

The integration and inter-relationship of Medalta and Exalta described in the evidence reflects far more than a mere physical connection or mutually beneficial commercial relationship and cannot be ascribed only to Medalta's contractual status as performing cartage or pick-up and delivery services for Exalta. In our view, the constitutional facts disclosed herein clearly establish that the "family" of companies which are Medalta, Exalta and Southeast Management are integrated and inter-related, practically, operationally and functionally to such an extent that, regardless of their corporate structures, from a labour relations perspective, they form a single operational enterprise or undertaking. They are, as described earlier by the Board in Exalta/Chief, *supra*, " ...regardless of the corporate structures, ...a single integrated transportation undertaking..." (page 26).

VI

The Board therefore concludes that it has jurisdiction to deal with the application for certification filed by the union. We are satisfied, pursuant to section 28(b) of the Code, that the unit applied for by the union constitutes a unit appropriate for collective bargaining.

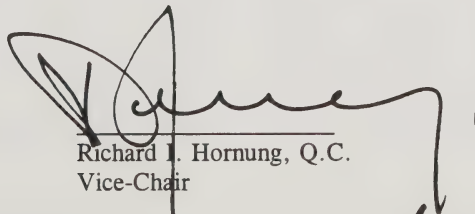
Accordingly, the Board orders as follows:

1. That the unit applied for and described as:

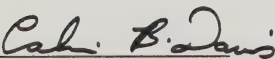
"All company drivers and dock workers employed by Medalta Distribution Services Ltd. and Exalta Transport Corp. excluding owner-operators, mechanics, safety co-ordinator, administrative assistant, and terminal supervisors"

is appropriate for the purposes of collective bargaining.

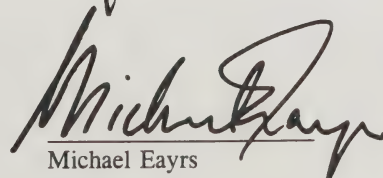
2. A review of the membership support, in the unit described above, establishes that the union has sufficient support to require the Board to order a vote of the employees pursuant to section 29(2) of the Code, and the Board so orders.
3. All those employees employed within the unit described above, as at the date of this decision, are eligible to cast ballots in the said vote.
4. The Board's officer in Vancouver, Mr. Harvey Farysey, is hereby empowered to conduct the vote at such time and in such fashion as he shall direct.



Richard J. Hornung, Q.C.
Vice-Chair



Calvin B. Davis
Member



Michael Eayrs
Member

information

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Summary

Association of Professionals and Supervisors of the Canadian Broadcasting Corporation, *applicant*, Canadian Broadcasting Corporation, *employer*, and CBC Managers' Association, Canadian Union of Public Employees, National Association of Broadcast Employees and Technicians, Syndicat des journalistes de Radio-Canada and Acadia and Quebec Production Employees' Union, *intervenors*.

Board File: 555-3583
CCRT/CLRB Decision no. 1118
May 1, 1995

These reasons deal with the date on which the list of employees eligible to participate in the vote ordered pursuant to section 29(2) of the Code (mandatory vote) should be established.

On January 13, 1995, the Board issued an order directing that a vote be held. In keeping with its normal practice in certification proceedings, it found that the union's representative character had to be established as of the date of the filing of the certification application (April 30, 1993) and that this date should be used to establish the list of eligible employees.

Following that order, the employer filed an application for reconsideration under section 18 of the Code. It claimed that the Board should choose a more recent date to establish that list so that employees hired after the certification application was filed could vote. It argued that the change is warranted because

Résumé

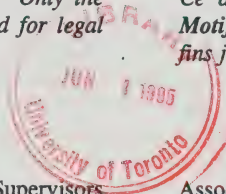
Association des professionnels et superviseurs de la Société Radio-Canada, *requérante*, Société Radio-Canada, *employeur*, et Association des cadres de la Société Radio-Canada, Syndicat canadien de la Fonction publique, Syndicat national des travailleurs et travailleuses en communication, Syndicat des journalistes de Radio-Canada et Syndicat des employés de production du Québec et de l'Acadie, *intervenants*.

Dossier du Conseil: 555-3583
CCRT/CLRB Décision n° 1118
le 1 mai 1995

Les présents motifs traitent de la date à laquelle la liste des employés admissibles au scrutin de représentation ordonné en vertu du paragraphe 29(2) du Code (scrutin obligatoire) devrait être établie.

Le 13 janvier 1995, le Conseil a rendu une ordonnance de scrutin. Suivant sa pratique habituelle en matière d'accréditation, il a jugé que le caractère représentatif du syndicat devait être établi à la date de la présentation de la demande d'accréditation (30 avril 1993) et que cette date serait celle utilisée pour dresser la liste des employés admissibles au scrutin.

À la suite de cette ordonnance de scrutin, l'employeur a présenté une demande de réexamen en vertu de l'article 18 du Code. Il allègue que le Conseil devrait fixer une date plus contemporaine pour dresser cette liste afin de permettre aux employés embauchés après le dépôt de la demande d'accréditation



of the high turnover in personnel since April 30, 1993, among other reasons. The application was dismissed.

In certification matters, the normal practice is to determine the bargaining agent's representative character as of the date of the filing of the application. The Board specified that when establishing the date of a mandatory vote pursuant to section 29(2) of the Code, it must look at other considerations, bearing in mind the actual purpose of this provision.

The Board looked at exceptions to the normal practice. It concluded after considering the case law that the employer's slowness in replying to the certification application does not constitute an unusual circumstance that warrants the Board's departing from its normal practice.

In the instant case, the Board decided that it would be unfair to alter this practice at the vote stage, because the rather long delays since April 30, 1993 were not attributable to the applicant, but rather to the employer's repeated requests for postponement.

Furthermore, the Board considers that the application for reconsideration should be dismissed since it was not filed within the time limits specified in section 37(2) of the Regulations. The employer had not provided any argument that would warrant the Board's processing the untimely application.

de voter. Il soutient que le changement de date se justifie, entre autres, en raison du roulement élevé de personnel depuis le 30 avril 1993. La demande a été rejetée.

La pratique habituelle en matière d'accréditation est de déterminer le caractère représentatif de l'agent négociateur à la date du dépôt de la demande. Le Conseil précise qu'en fixant la date d'un scrutin obligatoire en vertu du paragraphe 29(2) du Code, il doit étudier d'autres considérations, compte tenu de l'objet même du paragraphe en question.

Le Conseil examine les exceptions à la pratique habituelle. Il conclut de cette analyse de la jurisprudence que la lenteur de l'employeur à répondre à la demande d'accréditation n'est pas une circonstance justifiant que le Conseil s'écarte de la pratique habituelle.

En l'espèce, le Conseil décide qu'il serait inéquitable de modifier cette donnée à l'égard du scrutin alors que les délais passablement longs écoulés depuis le 30 avril 1993 ne sont pas imputables à la requérante mais à l'employeur qui a multiplié les demandes de report.

De plus, le Conseil estime que la demande de réexamen doit être rejetée car elle n'a pas été présentée dans les délais prescrits par le paragraphe 37(2) du Règlement. L'employeur n'a fourni aucun argument qui justifierait de traiter sa demande hors délai.

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Reasons for decision

Association of Professionals and Supervisors of
the Canadian Broadcasting Corporation,

applicant,

and

Canadian Broadcasting Corporation,

employer,

and

CBC Managers' Association, Canadian Union
of Public Employees, National Association of
Broadcast Employees and Technicians, Syndicat
des journalistes de Radio-Canada and Acadia
and Quebec Production Employees' Union,

intervenors.

Board File: 555-3583
CCRT/CLRB Decision no. 1118
May 5, 1995

The Board was composed of Mr. Serge Brault, Vice-Chairman, and Messrs. François Bastien and J. Jacques Alary, Members.

Appearances

Mr. Guy Dufort and Ms. Suzanne Thibodeau, Q.C., for the Canadian Broadcasting Corporation;

Mr. James R.K. Duggan, for the Association of Professionals and Supervisors of the Canadian Broadcasting Corporation;

Mr. Jean-Claude Bérard, for the CBC Managers' Association.

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman.

The Board reviewed the application filed by the employer following its order dated January 13, 1995 directing that a representation vote be held (Canadian Broadcasting Corporation, January 13, 1995 (LD 1385)). The Board held a hearing on March 29, 1995 to hear the parties' submissions on this application. These Reasons for decision were previously issued to the parties in Letter-Decision no. 1427, on April 21, 1995.

I

The Board considers that all but one of the issues raised by the employer pertain to procedural matters concerning the vote. These matters will have to be determined in the normal course of the vote and need not be dealt with at this stage.

This reconsideration application does, however, raise two questions that the Board should now decide. The first question, raised by the employer, deals with the date on which the list of employees eligible to participate in the representation vote ordered under section 29(2) of the Code should be established. The second question, raised by the union, pertains to the timeliness of the application.

In letter decision no. 1385, the Board referred to the applicant's representative character, which requires that a vote be held pursuant to section 29(2) of the Code. In keeping with its normal practice in certification matters, the Board found that the representative character of the Association of Professionals and Supervisors (APS) had to be established as of the date of the filing of the certification application. It determined that the following employees would be eligible to vote:

"... all employees who were working for CBC on April 30, 1993 and who occupy the 773 positions already included, as well as the incumbents of the 314 positions sought by the union, ... including the employees whose inclusion is in dispute."

The employer suggested that the Board choose a more recent date in order to establish the list of eligible employees to allow employees hired after the certification application was filed to vote.

The employer's argument is twofold. First, it argues that a more recent date is warranted because of the high personnel turnover since April 30, 1993. Second, it argues that some restructuring of positions, which has taken place since then, poses a major problem. According to the employer, determining which employees are eligible to vote entails three steps: first, determining whether an employee is the incumbent of a position which, as described on April 30, 1993, is included on the list; second, determining whether this position still exists, given the changes to job descriptions and the abolishment of positions; and third, determining whether this employee is still the incumbent of this position or its equivalent. Only then will the employee in question be eligible to vote.

The union objected to the timeliness of the reconsideration application filed by the employer. It argued that this application was improper, and that it was not filed within the time limit specified in section 37(2) of the Board's Regulations. It further stated that the employer had not provided any justification for its delay. Section 37(2) provides as follows:

"37.(2) An application under section 18 of the Act to reconsider a decision or order that is alleged to be erroneous in law or contrary to the policies of the Board shall be filed within 21 days after the date the decision or order being contested was made."

II

This case is not unlike Byers Transport Limited v. Western Canada Council of Teamsters et al., judgment rendered from the bench, file no. A-469-93, April 26, 1994 (F.C.A.). The facts, however, are different. At issue in that judgment was the

date used to determine the applicant's representative character. In that case, further to circumstances that had nothing to do with the applicant, a certification application could not be dealt with for several months. In a section 18 review proceeding, the Board had set aside an order directing that a vote be held; it had decided to ascertain the applicant's representative character as of the date of the filing of the application, not as of a later date as the employer had requested. The employer appealed the Board's decision to the Federal Court of Appeal, which affirmed the decision in these words:

"... As previously mentioned, [the Board] decided to follow its usual and traditional position of recognizing the validity of the results of the membership count at the time of the filing of the application, the principal reason for such a policy being to minimize employers' opportunity to interfere with the employees' freedom to select a bargaining agent. I cannot say in these circumstances that its decision to grant the certification application without a representation vote was patently unreasonable so as to justify the intervention of this Court. ..."

(page 8)

In certification matters, section 28(c) of the Code requires that the Board be "satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent."

The Board determines a trade union's representative character in two ways. On the one hand, it can use the membership cards filed with the certification application (Atomic Transportation System Inc. (1994), 94 di 48 (CLRB no. 1064), a decision rendered by the full Board; Radio CHNC Limitée, New Carlisle, Quebec (1985), 63 di 26; 12 CLRBR (NS) 112; and 86 CLLC 16,009 (CLRB no. 537), affirmed by the Federal Court of Appeal in Salariés de New Carlisle, Local 610 v. Syndicat des employés de CHNC New Carlisle (CNTU) et al. (1986), 79 N.R. 81; and 87 CLLC

14,048), since these cards represent the support the union enjoys among the bargaining unit members when the application is filed). On the other hand, it can order a representation vote. In both cases, it must establish a date as of which it will determine the representative character, and decide which employees are eligible for the check-off or the vote (section 30(1)(a) of the Code).

In certification matters, it is well established that, except in unusual circumstances, the date chosen to determine a bargaining agent's representative character is the date of the filing of the certification application. In keeping with the Board's normal practice, the only employees eligible for the check-off or the vote are bargaining unit members who were employees on the date the certification application was filed. (See for example North Canada Air Ltd. (Norcanair) (1978), 35 di 129; [1979] 3 Can LRBR 239; and 79 CLLC 16,194 (CLRB no. 204); and MacLean Hunter Cable TV Limited (1979), 34 di 752; and [1979] 2 Can LRBR 1 (CLRB no. 179).) CBC is asking the Board to depart from this practice and exercise its discretion by choosing a more recent date.

There are certainly exceptions that justify choosing an eligibility date other than the date of the filing of the application. However, they all attest to the Board's ongoing concern that the applicant union not be penalized where, for example, it is not responsible for the long delays. As was pointed out in Byers Transport Limited, supra, the reason why the Board is reluctant to choose a date other than the date of filing is to avoid the adverse effect any corporate restructuring or turnover in personnel subsequent to the filing of the application may have on the applicant bargaining agent's representative character (Murray Bay Marine Terminal Inc. (1983), 50 di 163 (CLRB no. 401), at page 171; American Airlines Incorporated (1981), 43 di 114; and [1981] 3 Can LRBR 90 (CLRB no. 301), at pages 126; and 99; Canadian Imperial Bank of Commerce, Sioux Lookout (1978), 33 di 432; and [1979] 1 Can LRBR 18 (CLRB no. 158), at pages 438-439; and 23-24).

Moreover, in setting a date for a mandatory vote held pursuant to section 29(2), the Board in our opinion must look at other considerations, given the actual purpose of this provision. Two in particular come to mind.

First, section 29(2) is specifically intended to support certification. This provision automatically entitles a union that files a certification application with minority support to a representation vote that may or may not be so its way. In other words, Parliament decided that, as soon as a trade union obtains the support of 35% of the members in a unit, the Board no longer has the power to dismiss a minority application. However, the union also takes upon itself a certain risk in filing such an application. If the application is dismissed, the union is subject to the sanction imposed by section 31 of the Regulations, and must wait six months before filing another application. Furthermore, the Board can only order a representation vote if the unit is not represented by a trade union. Section 30(2) is the only provision in the Code that allows the employees to decide whether or not they wish to be represented by a union. In fact, this is the only case in certification proceedings where the ballot does not offer a choice between unions, but rather that of being represented or not by a union. It is clear then that the purpose of section 29(2) is different from that of section 29(1). Section 29(2) gives a chance, as it were, to an aspiring bargaining agent by allowing it to end its organization campaign as soon as it has the support of 35% of the employees in a unit.

In the instant case, CBC does not challenge the fact that the Board acted properly in assessing the applicant's representative character as of the date of the filing of the certification application. To alter this determination at the next step, that is, the representation vote, when the applicant is not responsible for the rather long delays since April 30, 1993, would be unfair. The circumstances of this case do not warrant a departure from the established policy described earlier.

The Board concurs with the remarks of the Saskatchewan Labour Relations Board in Royal University Hospital (1993), 20 CLRBR (2d) 284, which remarks were cited by the employer. The Saskatchewan Board gives the following reasons for favouring the filing date as the eligibility date:

"... The reasons for selecting the date of the filing of the application as the basis for the voters' list is that experience has shown the Board that it is advisable to use a date that is as early as possible in the representation process, as this minimizes any opportunity for the employer to influence the outcome of the vote by tampering with the employee complement, or even to be perceived as having done so. The later the date is in the process, the more likely it is that every hiring or layoff will be perceived as manipulation and the ensuing litigation would greatly add to the expense and the complexity of the representation issue. Secondly, if the applicant's organizing of the employees must stop on the date of filing, then logic suggests, and fairness to the applicant requires, that the calculation of whether it has a majority must also be based upon the employee complement as it existed on that date, regardless of when the calculation is actually done and what changes to the work-force occur during the interval. ..."

(page 285; emphasis added)

This reasoning of the Saskatchewan Board is especially relevant in the context of a mandatory vote held pursuant to section 29(2) of the Code where the union stopped recruiting members on the date it filed its certification application in order to participate in a vote. Besides, the union was in no way responsible for the delay in holding the vote.

Admittedly, in that case, the Saskatchewan Board departed from its general policy in favour of the date of the vote. Two and a half years had elapsed since the application was filed, and nearly one-half of the employees had since been replaced. However, the purpose of the vote was to determine which of two unions the employees wanted as bargaining agent. The vote was therefore not mandatory.

In support of its arguments, the employer cited four Board decisions: Verreault Navigation Inc. (1981), 45 di 72 (CLRB no. 325), affirmed by the Federal Court of Appeal in Verreault Navigation Inc. v. Seafarers' International Union of Canada et al., [1983] 2 F.C. 203; Crosbie Offshore Services Limited (1982), 51 di 120 (CLRB no. 399), affirmed by the Federal Court of Appeal in Crosbie Offshore Services Limited v. Canadian Merchant Service Guild et al., judgment rendered from the bench, file no. A-1162-82, November 21, 1983; Skeena Broadcasters Ltd. (1982), 49 di 27; and 82 CLLC 16,165 (CLRB no. 374); and Empire Stevedoring Co. Ltd. et al. (1981), 45 di 36 (CLRB no. 323). In those cases, the Board had ordered that the list of eligible employees be established as of the date of the Board's decision, not as that of the filing. We do not believe that these decisions apply in the instant case.

The Board notes, first, that none of those cases involved a mandatory vote; instead, they involved the application of section 29(1) of the Code, that is, a vote that the Board has discretion to order. Second, they all involved unusual circumstances in which the Board saw fit to depart from its general policy, and decided that the eligible employees would not be those employed when the certification application was filed.

For example, in Verreault Navigation Inc. (325), supra, four years had elapsed since the filing of the certification application and the business in question was a seasonal operation.

In Crosbie Offshore Services Limited (399), supra, the Board took into account the constant turnover in crew members in the shipping industry. One of the questions at issue in that case was the holding of a second vote. Employees who were bargaining unit members on the date of the Board's decision, and who would still be employees on the date of the vote, were eligible to vote.

And Skeena Broadcasters Ltd., supra, involved raiding.

It is true that in Empire Stevedoring Co. Ltd. et al., *supra*, the Board ordered a representation vote given that some time had elapsed since the filing of four certification applications in which the parties had long neglected to proceed despite pressure from the Board. However, as the Board pointed out, the parties themselves were responsible for this delay, and it is not surprising that a vote was ordered in the circumstances among the persons employed on the date of the Board's decision. In the instant case, however, the situation is very different because the delays are attributable to circumstances that have nothing to do with the applicant. On the contrary, these delays are attributable to the employer who repeatedly requested postponements, in particular with respect to submitting employee lists.

An examination of the relevant case law indicates that the employer's slowness in replying to a question in a certification proceeding is not an unusual circumstance, or one that warrants the Board's departing from its normal practice.

The employer also referred to the provisions of the Labour Relations Act of Ontario, in particular the provisions dealing with the "pre-hearing vote" and the mandatory vote. These provisions are contained in section 8(2) of the Labour Relations Act, R.S.O. 1990, c. L.2., which reads as follows:

"8(2) The Board shall direct that a representation vote be taken if it is satisfied that at least 40 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union on the certification application date or have applied to become members on or before that date."

As summarized by George W. Adams in his work Canadian Labour Law, 2d ed. (Aurora, Ont.: Canada Law Book Inc., 1993), the Ontario Labour Relations Board's normal practice consists, first, in ascertaining employee support as of the date of the filing of the certification application. When this support is between 40% and 55%, the OLRB orders a vote, and eligible employees are those who were working when the

vote was ordered and who are still working when the vote is held (London District Crippled Children's Treatment Centre, [1980] OLRB Rep. Apr. 461).

Although this provision is similar to the one in the Canada Labour Code, the particular context of the Labour Relations Act, for which the OLRB developed its practice, is very different from the context of the Canada Labour Code. We draw attention in particular to the specific provisions of section 9 of the Labour Relations Act, dealing with the "pre-hearing vote." According to this section, a union seeking certification may request that a pre-hearing representation vote be taken. The employer has eight days in which to produce employee lists, etc. The OLRB then determines summarily a voting constituency. It ascertains that not less than 35 % of the employees in the voting constituency were union members at the time the application was made (section 9(2) of the Labour Relations Act). If so, it may order a representation vote among the persons employed on the date the vote is ordered. The OLRB may then direct that the ballot boxes be sealed pending its decision on the merits (sections 9(3) and (4) of the Labour Relations Act).

According to the OLRB's Annual Report for 1993-1994 (at page 74), the OLRB takes on average 22 days from the date of the filing of a certification application to deal with the application. Thus, under the Labour Relations Act, a union that files a certification application with minority support can avail itself of this expedited procedure known as the "pre-hearing vote." Moreover, given the average time the OLRB takes to process an application, the amount of time between the date of the filing of the application and the date of the vote is relatively short. This particular context of the Labour Relations Act in no way resembles the context of this case. Because of this significant difference, it is, in our opinion, difficult to apply the Ontario experience to the present circumstances, and to draw any comparisons between the OLRB's practice and that of the CLRB.

For all these reasons, the Board considers that it need not amend the date chosen to determine the eligible employees, and dismisses the reconsideration application.

III

The second question the Board must examine is the untimeliness of the employer's application. Section 37(2) of the Regulations provides that an application under section 18 of the Code must be filed within 21 days of the date of the contested decision. The employer's application is untimely and, in any case, does not raise any argument that would warrant the Board's waiving the time limit. In Canadian Broadcasting Corporation (1994), 93 di 214 (CLRB no. 1056), at pages 219-220, the Board dismissed a reconsideration application filed by the union because the application had not been filed within the time limit provided in section 37(2) of the Regulations and because the union had not acted with due diligence. CBC did not give any reason why the Board should dispense with the 21-day rule and this alone is reason enough to dismiss its application.

IV

Accordingly, the Board confirms its initial order which reads in part as follows:

"The Board therefore decided to grant the request and orders that a representation vote be taken forthwith, even if no final decision has been taken concerning the exclusions. The vote will be held by mail; all employees who were working for CBC on April 30, 1993 and who occupy the 773 positions already excluded, as well as the incumbents of the 314 positions sought by the union, will be invited to participate, including the employees whose inclusion is in dispute. ..."

(Letter decision no. 1385, page 8)

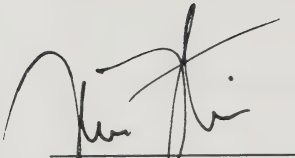
Given the time that has elapsed since the initial order was issued on January 13, 1995, the vote will be held before June 15, 1995. If CBC still wishes to submit job descriptions for the positions in dispute, it must do so no later than May 12, 1995. The union will have 15 days to respond.

If either party feels that persons whose names appear on the list have lost their employee status, that party is free to raise the matter, as is standard procedure, in the course of the voting process.

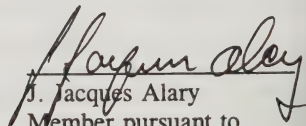
This is a unanimous decision.



Serge Brault
Vice-Chairman pursuant to
section 11 of the Code



François Bastien
Member



J. Jacques Alary
Member pursuant to
section 11 of the Code

information

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Summary

International Longshoremen's and Warehousemen's Union, Local 500, on behalf of Mr. Herbert Howe, *complainant*, and Vancouver Wharves Limited, *respondent*.

Board File: 950-293

CLRB/CCRT Decision no. 1119

May 8, 1995

Résumé

Syndicat international des débardeurs et magasiniers, section locale 500, au nom de M. Herbert Howe, *plaignant*, et Vancouver Wharves Limited, *intimée*.

Dossier du Conseil: 950-293

CLRB/CCRT Décision n° 1119

le 8 mai 1995

The present case raises two issues: a) the nature and extent, if any, of the Board's remedial powers under Part II of the Code and b) whether or not, as a matter of policy, it should award costs under this Part.

La présente affaire soulève les deux questions suivantes: a) quelle est la nature et la portée, le cas échéant, des pouvoirs de redressement du Conseil aux termes de la Partie II du Code; et b) le Conseil devrait-il, comme politique, accorder des dépens en vertu de cette Partie.

Mr. Howe was laid off from his employment with the respondent. He claimed his lay-off was contrary to section 147 of the Code because, as a safety and health representative and committee member, he had sought the enforcement of Part II of the Code. The respondent raised a preliminary issue, pursuant to section 133(1), claiming that Mr. Howe had failed to establish that he had been involved in any particular work refusal contemporaneous with his lay-off. The evidence ultimately supported the respondent's position and the complainant applied to withdraw the complaint. The respondent argued that the complaint was frivolous and constituted an abuse of the Board's process. The respondent, alleging exceptional circumstances, sought compensation totalling \$500.00 for the loss of productivity incurred as a result of this complaint.

L'intimée a mis M. Howe à pied. M. Howe allègue que cette mise à pied allait à l'encontre de l'article 147 du Code parce que, en sa qualité de représentant et membre du comité de santé et de sécurité, il avait cherché à faire appliquer les dispositions de la Partie II du Code. L'intimée a soulevé une question préliminaire, aux termes du paragraphe 133(1), alléguant que M. Howe n'a pas réussi à prouver qu'il était lié à un refus quelconque de travailler à la même époque où il a été mis à pied. La preuve a éventuellement étayé la position de l'intimée, et le plaignant a présenté une demande de désistement. L'intimée prétend que la plainte était frivole et qu'elle constituait un emploi abusif des procédures du Conseil. Alléguant qu'il s'agissait de circonstances exceptionnelles, l'intimée a demandé un dédommagement de l'ordre de 500 \$ pour perte de productivité découlant de la plainte.

In virtue of section 99(2), the Board, under Part I of the Code, has the authority to award compensation provided that a violation of the Code has been found. The Board has the same remedial powers and restrictions under Part II of the Code. In the present case, the outcome of the complaint precludes the Board from granting the remedy sought by the respondent. Given the request for withdrawal, no determination had been made as to a violation of the Code. In the absence of such a breach, the Board is without jurisdiction to grant a remedy, including that of costs.

As well, as a matter of policy, the Board does not generally award costs in complaint proceedings under Part I. Costs are considered to be punitive in nature as well as a deterrent in bringing complaints to the Board. The Board considers that its policy of not granting compensation should be maintained under Part II of the Code particularly where the legislative purpose resides in having safety matters resolved in a collaborative manner.

Accordingly, the Board dismisses the request for compensation presented by the respondent and accepts the complainant's application for withdrawal of his complaint.

Aux termes du paragraphe 99(2) de la Partie I du Code, le Conseil peut accorder des dédommagements pourvu qu'il détermine qu'il y a eu violation du Code. Le Conseil détient les mêmes pouvoirs de redressement et fait face aux mêmes restrictions en vertu de la Partie II du Code. Dans la présente affaire, le Conseil ne peut, en raison de l'issue de la plainte, accorder le redressement demandé par l'intimée. Étant donné la demande de désistement, le Conseil ne s'est pas prononcé sur la question de violation du Code. Par conséquent, le Conseil n'a pas la compétence pour accorder un redressement, y compris des dépens.

En outre, le Conseil n'a pas pour politique d'accorder en général des dépens dans une affaire de plainte fondée sur la Partie I. Les dépens sont considérés comme une mesure punitive ainsi qu'un facteur de dissuade quant au dépôt de plaintes. Le Conseil estime que sa politique de ne pas accorder de dédommagement devrait être maintenue aux termes des dispositions de la Partie II, surtout que l'objet du Code est de résoudre les questions de sécurité dans un contexte de collaboration.

En conséquence, le Conseil rejette la demande de dédommagement présentée par l'intimée et fait droit à la demande de désistement du plaignant.

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LES MOTIFS DE DECISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

International Longshoremen's and
Warehousemen's Union, Local 500,
on behalf of Mr. Herbert Howe,

complainant,

and

Vancouver Wharves Limited,

respondent.

Board File: 950-293
CLRB/CCRT Decision no. 1119
May 8, 1995

The Board was composed of Ms. Suzanne Handman, Vice-Chair, Mr. François Bastien and Ms. Mary Rozenberg, Members.

Appearances

Ms. Leah Terai assisted by Mr. Tom Dufresne, for the complainant; and Mr. R. Patrick Saul, assisted by Mr. Athwal Monagu, for the employer.

The reasons for decision were written by Ms. Suzanne Handman, Vice-Chair.

This case concerns a complaint filed by the International Longshoremen's and Warehousemen's Union, Local 500 on behalf of Mr. Herbert Howe, the complainant, pursuant to section 133(1) of the Canada Labour Code, alleging a violation of section 147(a)(i)(ii), and (iii) by his employer, Vancouver Wharves Limited.

Mr. Howe received notice in writing on June 6, 1994 advising him of his lay-off from his position as a regular work force employee millright, effective June 13, 1995. In his complaint dated September 8, 1994, Mr. Howe claims that he was laid off contrary to section 147 of the Code because, as a safety and health committee member, and as a safety and health representative, respectively, he had sought the enforcement of the provisions of Part II of the Code and had provided information to Labour Canada and the Canadian Coast Guard which resulted in the prosecution of Vancouver Wharves.

I

The Board held a hearing in Vancouver on February 28, and March 1, 1995. Vancouver Wharves, in its written submissions and at the outset of the hearing, raised as a preliminary issue the Board's jurisdiction to deal with the complaint. It maintained inter alia, that the complaint was not properly before the Board since the pre-conditions for filing a section 133 complaint had not been met.

Section 133(1) states:

"133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention."

The employer contended that section 133(1) restricts the filing of a complaint in situations where the employer's action is allegedly taken because the employee has engaged in a refusal to work in accordance with section 128 or 129. It claimed that the complainant had failed to establish *prima facie* that he had been involved directly or indirectly in any work refusal, contemporaneous with his lay-off.

Counsel for the complainant submitted that Mr. Howe had been involved in an accumulation of work refusals during the course of his duties regarding safety issues and argued that section 133 is not limited to a particular refusal.

The Board rejected the complainant's broad interpretation of section 133 and held that to bring the complaint within the terms of this section, specific facts relating to a work refusal were required. (See Steve Kasper (1992), 90 di 130 (CLRB no. 979); Patrick Berry (1991), 84 di 179 (CLRB no. 859); and Lila K. Walker and David W. Bryant (1989), 78 di 123 (CLRB no. 754).)

As a result of the Board's determination, the complainant presented evidence concerning a work refusal, contemporaneous with his lay-off, in which he was involved as a member of the safety committee. Mr. Howe had not noted the exact date of the alleged work refusal but believed that it had taken place in mid May 1994, prior to his lay-off in June, 1994.

A review of Vancouver Wharves' records, however, failed to support this evidence. On the second day of the hearing, a company foreman stated that the records he had verified showed the incident described by Mr. Howe, according to his recollection, had occurred on June 8, 1994 rather than during the month of May.

As a result of this testimony which established that the work refusal had taken place two days after Mr. Howe's lay-off notice, Counsel for the complainant presented an application to withdraw the complaint.

Counsel for the employer then informed the Board that Vancouver Wharves was seeking compensation for costs incurred and requested authorization to present written submissions on this issue.

The Board advised the parties that it would dispose of the question of compensation and the application for withdrawal following written submissions from both parties.

II

Vancouver Wharves alleges that the complainant fabricated a work refusal, cast unsubstantiated aspersions on a manager, and filed a complaint which is not only frivolous but constitutes an abuse of the Board's process. As a result, Vancouver Wharves is seeking compensation totalling \$500.00 for the loss of one-half day of productivity of two managers who were required to attend the second day of the hearing solely to respond to the position taken by the complainant.

The employer maintains that the Board may order compensation in exceptional cases and submits that the unusual circumstances in the present case justify such a remedy. Its assertion concerning the Board's jurisdiction to award costs is based upon sections 15 and 21 of the Code and Board decisions. In virtue of these sections, the Board, acting under Part II, has all the powers conferred on it by Part I which would include the remedial power to grant costs pursuant to section 99(2) of the Code.

III

The present case raises two issues: a) the nature and extent, if any, of the Board's remedial powers under Part II of the Code and b) whether or not, as a matter of policy, it should award costs under this Part.

The Board has specific authority under section 118 of the Code to pay an allowance for expenses and a witness fee to a person summoned by the Board to attend a hearing and

who so attends. This provision, however, is not applicable in the present case since no subpoenas had been issued to the two managers for whom compensation is claimed.

As for other costs, it is now well established that the Board, in respect of Part I of the Code, has the power to award compensation. (See National Bank of Canada (1984), 56 di 107; and 84 CLLC 16,038 (CLRB no. 466); and British Columbia Telephone Company (1986), 65 di 97 (CLRB no. 569).) The authority to do so is found in section 99(2) of the Code which provides the Board with broad powers of reparation.

Section 99(2) reads as follows:

"99.(2) ... the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

A cursory review of the jurisprudence, however, indicates the Board's jurisdiction to order costs is limited. (See National Bank of Canada, *supra*; and George Boulos (1994), 94 di 17 (CLRB no. 1059).) Specifically, section 99(2) is applicable only in the event that a violation of the Code has been found. Consequently, in accordance with this provision, where no contravention of the Code has been established, the Board cannot order a remedy.

In virtue of sections 156(2) and 21 of the Code, the Board under Part II has the same remedial powers as under Part I. It also is subject to the same limited authority to award costs.

In the present case, the outcome of the complaint precludes the Board from granting the remedy sought by Vancouver Wharves. Given the request for withdrawal, the Board did not decide either the merits of the complaint or whether there had been any contravention of the Code. In the absence of a determination that one of the parties breached the Code, the Board lacks authority to provide any remedy whatsoever. Consequently, an order awarding costs against the complainant or the union, as requested by Vancouver Wharves, would necessarily constitute an excess of jurisdiction.

IV

Irrespective of the foregoing conclusion, the request for compensation would not succeed on the basis of policy considerations. As a matter of policy, the Board generally does not award costs in complaint proceedings. (See Kevin Allison MacLaren (1982), 47 di 7 (CLRB no. 361); Bank of Montreal (1985), 61 di 83; and 10 CLRBR (NS) 129 (CLRB no. 518); National Bank of Canada, *supra*; and British Columbia Telephone Company, *supra*.) One of the principle reasons for adopting such a position is that an award of costs has the effect of identifying a winner and a loser which is not conducive to re-establishing healthy labour relations. In addition, awarding costs is considered as a punitive measure which is inappropriate in the context of labour board remedies.

The policy of this Board corresponds to the practice of other labour relations boards which, as a general rule, do not award costs. Robert W. Kerr in his work Labour Relations Board Remedies in Canada (Aurora, Ontario: Canada Law Book, 1993) gives the following reasons for such a position:

"Boards have expressed concern that the award of costs to a successful complainant would be perceived as unfair unless costs against unsuccessful complainants are also awarded. The possibility of an award of costs against a complainant, on the other hand, could be a serious deterrent to the bringing of a complaint. ..."

...

Boards are concerned that an award of costs might be perceived as punitive and create a sense that there are winners and losers in proceedings before the labour board. This could undermine the mediative approach of the board and the effort to promote a successful bargaining relationship.

There is also concern that the awarding of costs would tend to introduce into board proceedings legal complexity comparable to that involved in the award of costs by the courts. This would tend to place representatives without legal training at a disadvantage, undermining the participation of lay representatives and the informal nature of board proceedings."

(pages 9-62 and 9-63)

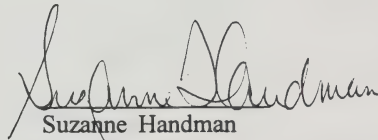
If the Board's policy, as set out above, is not to award costs under Part I, there is an even more compelling reason not to do so under Part II given the objectives of this Part of the Code. The purpose of Part II is to prevent the occurrence of accidents and injuries during the course of employment and to ensure safe work places. The Code foresees a collaborative approach to safety issues including the establishment of joint management-employee safety and health committees. The underlying theme of this Part is founded upon discussion and co-operation in settling disputes as opposed to Part I which tends to be more adversarial in nature. Considering the legislative intent of having safety issues resolved in a non-contentious manner, the Board is of the view that its practice of not granting compensation should be maintained in proceedings coming under the occupational safety and health provisions of Part II.

V

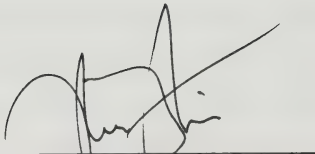
In light of the Board's conclusions on this matter, there is no need to determine whether the alleged circumstances are exceptional and, as such, justify an award of costs. However, even if the Board had jurisdiction to grant a remedy in the present complaint,

the Board does not consider this to be an appropriate case to depart from its established policy.

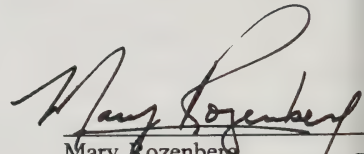
For the foregoing reasons, the Board dismisses the request for compensation presented by Vancouver Wharves Limited and accepts the complainant's application for withdrawal of his complaint.



Suzanne Handman
Vice-Chair



François Bastien
Member



Mary Rozenberg
Member

information

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Summary

Greg Horrill/Seller, *complainant*, and Garden Grove Produce Imports Limited, *respondent*.

Board File: 950-299
CLRB/CCRT Decision no. 1120
May 18, 1995

Résumé

Greg Horrill/Seller, *plaignant*, et Garden Grove Produce Imports Limited, *intimée*.

Dossier du Conseil: 950-299
CLRB/CCRT Décision n° 1120
le 18 mai 1995

The complainant, a long-distance truck driver, working for a Canadian company which operates throughout North America, alleged that the employer violated section 147(a)(iii) of the Code by dismissing him for refusing to work because of safety reasons.

The employer, while acknowledging the complainant's work refusal, maintained that the complainant had resigned and was not dismissed. The Board considered the complainant's explanation of what had transpired to be more probable than that of the employer and concluded that he had been dismissed.

With respect to the complaint, the employer questioned its validity since the complainant never mentioned he was tired nor did he contact a safety officer. The Board has adopted a liberal view of an employee's compliance with sections 128(6) or 129(1) of the Code and, in the present case, found there to have been sufficient compliance with these provisions for the complaint to be considered on its merits.

Commercial drivers, such as the complainant, while driving in the United States are subject to the Federal Motor Carrier Safety Regulations. These regulations stipulate that,

Le plaignant, un camionneur de longue distance qui travaillait pour une entreprise canadienne exploitée à l'échelle de l'Amérique du Nord, allègue que l'employeur a enfreint le sous-alinéa 147a)(iii) du Code en le congédiant pour avoir refusé de travailler pour des raisons de sécurité.

L'employeur reconnaît le refus du plaignant de travailler, mais il soutient que le plaignant a démissionné et qu'il n'a pas été congédié. Le Conseil considère que l'explication donnée par le plaignant est plus plausible que celle de l'employeur et conclut que le plaignant a été congédié.

Par ailleurs, l'employeur met en doute la validité de la plainte puisque le plaignant n'a jamais dit être fatigué et n'a pas communiqué avec un agent de sécurité. Le Conseil se montre large d'esprit lorsqu'il détermine si un employé s'est conformé aux paragraphes 128(6) et 129(1) du Code et, dans la présente affaire, il a décidé que le plaignant s'est suffisamment conformé à ces dispositions pour que la plainte soit examinée au fond.

Les camionneurs commerciaux, comme le plaignant, qui doivent se déplacer aux États-Unis, sont assujettis aux Federal Motor Carrier Safety Regulations. Ces règlements

in an eight-day driving cycle, two consecutive 24-hour rest periods must be taken following 70 hours of on-duty time. The complainant, who was carrying a load in the U.S., refused to continue driving when he had virtually exhausted the maximum number of permissible on-duty hours.

The Board considers that the knowledge of the impending breach of a safety regulation was sufficient for the complainant to have reasonable cause to believe that continuing to drive constituted a danger to him. Furthermore, the employer was well aware that his refusal to continue driving was related to safety considerations. Nevertheless, when he refused to drive further, he was dismissed. The Board is satisfied that the disciplinary action taken was in contravention of section 147(a)(iii) of the Code. Accordingly, the Board allowed the complaint and ordered the reinstatement of the complainant with full compensation for all losses incurred.

prévoient qu'un chauffeur doit prendre deux périodes de repos consécutives de 24 heures dans le cadre d'un cycle de travail de huit jours après avoir été de service pendant 70 heures. Le plaignant, qui transportait une charge aux É.-U., a refusé de continuer à conduire le camion parce qu'il avait pratiquement épuisé le nombre maximum d'heures de service autorisées.

Selon le Conseil, savoir qu'il y aurait violation d'un règlement de sécurité suffisait pour donner au plaignant un motif raisonnable de croire que continuer à conduire le camion constituait un danger pour lui. De plus, l'employeur savait très bien que le refus de continuer à conduire le camion était relié à des questions de sécurité. Néanmoins, lorsqu'il a refusé de continuer, le plaignant a été congédié. Le Conseil est convaincu que la mesure disciplinaire imposée allait à l'encontre du sous-alinéa 147a)(iii) du Code. Par conséquent, le Conseil a accueilli la plainte et a ordonné que le plaignant soit réintégré et dédommagé pour toutes pertes subies.

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Travail

Reasons for decision

Greg Horrill/Seller,

complainant,

and

Garden Grove Produce
Imports Limited,

respondent.

Board File: 950-299
CLRB/CCRT Decision no. 1120
May 18, 1995

The Board was composed of Ms. Suzanne Handman and Mr. Philippe Morneault, Vice-Chairs and Mr. Calvin Davis, Member.

Appearances

Mr. Greg Horrill/Seller, on his own behalf;

Mr. Glen Behl, President for Garden Grove Produce Imports Limited assisted by Mr. Robert Book, Traffic Manager.

These reasons for decision were written by Ms. Suzanne Handman, Vice-Chair.

I

This case concerns a complaint filed on February 16, 1995, pursuant to section 133(1) of the Canada Labour Code by Mr. Greg Horrill/Seller (the complainant). Mr. Seller, a long distance truck driver, alleges that Garden Grove Produce Imports Limited (Garden Grove or the employer) violated section 147(a)(iii) of the Code by dismissing him for invoking his right to refuse to work because of safety reasons.

Garden Grove, in its reply, while acknowledging the complainant's work refusal, maintained that he had resigned and was not dismissed.

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The Board heard the complaint in Winnipeg on April 3, 1995.

II

Mr. Seller was hired on December 27, 1994 by Garden Grove as a long distance truck driver. The Company, located in Winnipeg, Manitoba, is engaged in trucking operations and, in the regular course of its business, operates throughout North America.

Commercial drivers such as the complainant, whether in Canada or the United States, are subject to safety regulations. In the U.S., the Federal Motor Carrier Safety Regulations govern employers, employees and commercial motor vehicles involved in interstate commerce. Canadian firms, while trucking in the United States, must comply with U.S. Regulations.

By virtue of these Regulations, drivers are required to record their duty status for every 24 hour period, indicating on-duty and off-duty time. On-duty time consists not only of driving time but also includes related responsibilities such as the total time involved waiting for repairs, loading or unloading a vehicle, etc.

Mr. Steve Hayman, Supervisor of Facility Audits, Department of Manitoba Transportation, Safety and Regulations, testified that the Regulations in force in Canada and the United States limit the number of on-duty hours in any driving cycle. In an 8 day cycle, in the United States, a maximum of 70 hours of on-duty time is permitted following which two consecutive 24 hour rest periods must be taken. In Canada, the mandatory rest period following an 8 day/70 hour cycle is 24 hours.

On a daily basis, a driver in the United States cannot exceed 10 hours of driving following eight consecutive hours off-duty. In Canada, after the same off-duty period, a maximum of 13 hours of driving is permitted.

On December 28, 1994, Mr. Seller left on his first trip as a driver for Garden Grove, destined for Pearsall, Texas. From the time of departure, he was in contact with Mr. Robert Book, the company's transportation manager, on a regular basis. In the following days, he called from Grand Forks, North Dakota and from Lebo, Kansas. During the trip, the truck and unit required several repairs and the employer was advised accordingly.

Mr. Seller reached his destination and delivered his load on December 31, 1994. He was then instructed to go to Hidalgo, Texas, for one load and to Donna, Texas for another. The goods consisted of perishable fruit and were bound for Calgary.

During the return trip, Mr. Seller continued to report to his employer. He informed the company on January 1, 1995, that the unit was loaded and called again from San Antonio, Texas.

On January 2, 1995, Mr. Seller called either from Ozona or Fort Stockton, Texas. This was the employer's first indication that Mr. Seller was not following a direct northern route back to Canada. Mr. Book stated that, at this point, Mr. Seller had driven so far west that he had no choice but to proceed to El Paso where he was 326 miles "out of route".

Mr. Book claimed he had given Mr. Seller route directions to reach Calgary. Mr. Seller denied receiving any specific directions and maintained that on January 2, 1995, he had advised Mr. Book of the route he planned to take. That route passed through El Paso. According to the complainant, the transportation manager voiced no objections to his proposed route.

On January 3, 1995, Mr. Seller called his employer from Albuquerque, New Mexico, to say he was "running out of hours". Given that he only had five driving hours left, he could not make the delivery on time. He was asked to call back in thirty minutes

during which time Mr. Book contacted the customer and obtained a 24 hour extension for the delivery of the load until Friday, January 6th, 1995.

The parties differed as to what transpired in the ensuing conversation. Mr. Book claimed he offered Mr. Seller a 24 hour rest period in compliance with safety regulations so that he could again begin a new driving cycle consisting of 70 (on-duty) hours. He also advised the complainant of the extension of time but Mr. Seller did not believe he could deliver the goods even for Saturday, January 7, 1995. Mr. Seller, on the other hand, denied he was offered any time off and said he advised his employer he could deliver the load on Saturday morning (January 7, 1995).

Believing that Mr. Seller could not deliver the goods on time, the employer looked for another driver to assure their timely delivery and, being unable to find anyone on short notice, assigned Mr. Book to deliver the load.

Mr. Book flew to Denver, Colorado, which was the airport closest to Albuquerque, New Mexico, to which he could book a flight, while Mr. Seller drove to Denver to meet him. Again, there was contradictory evidence. While the employer stated that Mr. Seller was "asked" to travel to Denver as a professional courtesy, Mr. Seller claimed he was given no choice; he was instructed to go and by the time he arrived, after a 9 hour drive, he had exceeded the permissible number of hours foreseen by the Regulations. He then had logged 74 ¼ on-duty hours in 8 days, the maximum being 70 hours.

From this point on, the parties' version of the facts continued to differ.

According to Mr. Book, he arrived at the Vickers truck stop in Denver late in the evening of January 3, 1995 where he found the complainant asleep in the truck. Mr. Seller wanted a ride to Winnipeg and said he would travel in the sleeper. Mr. Book, advised him that there was no guarantee he would drive directly to Winnipeg from Calgary and began preparing the unit for the journey. Mr. Seller then removed

his belongings from the truck and left. Given that the complainant had refused to continue driving, Mr. Book took this to mean that he had resigned and did not intend to work for the company any longer. Mr. Book departed and shortly thereafter contacted Mr. Behl, the company president. During their conversation, he advised Mr. Behl that he would not return with Mr. Seller as a passenger. Mr. Book continued the journey, and drove directly to Calgary. He completed the trip 31 hours later, arriving at his destination on Thursday, January 5, 1995 at 6 a.m. local time.

Mr. Seller's version as to what transpired was as follows: After Mr. Book arrived at the truck stop they discussed the complainant's refusal to work. Mr. Seller told Mr. Book he would stay in the sleeper on the return trip since he was "out of hours" and would not drive again until he had on-duty hours available to him. Mr. Book responded by saying he also "drove single", referring to Mr. Seller's preference for driving alone. Mr. Seller asked whether this meant he was fired. Mr. Book said "yes" and after Mr. Seller questioned whether he was to remove his belongings from the truck, suggested that he do so. While Mr. Book was preparing for departure, Mr. Seller asked for money in order to return to Canada but received no assistance whatsoever. The following day, Mr. Sellers called several organizations including Traveller's Aid, Salvation Army, and the Canadian Consulate Trade Office in an attempt to obtain funds to travel to Canada. He sought redress from the U.S. Department of Labour and also called Labour Canada concerning the exercise of his right to refuse work under Part II of the Code.

III

During the hearing, considerable evidence was presented by both parties on various subjects that were not material to the case. However, two issues which were raised warrant mention. One concerns the additional miles driven by Mr. Seller and the other relates to his method of maintaining records.

The employer stated that Mr. Seller had driven 326 miles out of route and as a result had exhausted the number of hours available to him. Mr. Seller, on the other hand,

claimed that drivers have a choice of routes, subject to being paid according to the most direct route. While the alternate highway was more direct, the one he had selected was an interstate highway and a better route. Mr. Hayman, who testified on behalf of the complainant, estimated that, by milage figures alone, approximately six hours may have been gained had the more direct route been taken but added that various factors come into play in comparing two routes and one was not necessarily faster than the other.

The employer also testified that Mr. Seller had improperly logged on-duty time when the truck or unit was being repaired and pointed to his method of recording as an additional reason he had exhausted his available driving time. Mr. Seller claimed that in accordance with the Regulations, he was required to record the time the unit was being repaired as on-duty time. Once time has been recorded in the log book, it cannot be removed.

IV

The complainant alleges that he was dismissed contrary to section 147(a)(iii), because he exercised his right to refuse to work in accordance with Part II of the Code. Section 147 provides in part:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

...

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; or ..."

The Code foresees that an employee may refuse to perform work when the employee has reasonable cause to believe that the work he is refusing to do constitutes a danger to himself/herself or to another employee. The procedure governing the exercise of the right to refuse is set out in sections 128 and 129 of the Code. The relevant sections, namely 128(1), 128(6), 128(7) and 129(1) read as follows:

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place.

...

(6) Where an employee refuses to use or operate a machine or thing or to work in a place pursuant to subsection (1), or is prevented from acting in accordance with that subsection pursuant to subsection (4), the employee shall forthwith report the circumstances of the matter to his employer and to

(a) a member of the safety and health committee, if any, established for the work place affected; or

(b) the safety and health representative, if any, appointed for the work place affected.

(7) An employer shall forthwith on receipt of a report under subsection (6) investigate the report in the presence of the employee who made the report and in the presence of

(a) at least one member of the safety and health committee, if any, to which the report was made under subsection (6) who does not exercise managerial functions;

(b) the safety and health representative, if any; or

(c) where no safety and health committee or safety and health representative has been established or appointed for the work place affected, at least one person selected by the employee.

...

129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative."

Compliance with these provisions, as described hereinafter, is required for the complaint to be valid.

The process is triggered by a refusal to work which must immediately be reported by the employee to his employer and to a member of the safety and health committee or to a safety and health representative. The employer is then required to investigate the matter in the presence of the employee concerned and in the presence of at least one member of the safety and health committee or a representative or, in their absence, at least one person selected by the employee. If the matter is not settled at this point, both the employer and the employee must notify a safety officer in order that an investigation be carried out.

In the present case, although no formal preliminary objections were raised, the employer implicitly questioned the validity of the complaint in terms of sections 128(6) and 129(1) respectively, since the complainant never mentioned he was tired at the time of his refusal nor did he subsequently contact a safety officer, in accordance with the Code.

In the past, the Board has adopted a liberal view of an employee's compliance with section 128(6) or 129(1). With respect to section 128(6), it has repeatedly held that a

complaint need not be formal and detailed in order to comply with the letter and spirit of the Code. It is sufficient that the employer is aware that the employee is refusing to work for safety reasons (See Harry Finley (1992), 90 di 35 (CLRB no. 966); Gaetan Lapointe (1992), 87 di 83; and 16 CLRBR (2d) 119 (CLRB no. 920); Marv Glover et al. (1988), 73 di 1 (CLRB no. 672); and William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332).)

There is no question that the employer, in this instance, was cognizant of the nature of the safety complaint and the resulting refusal to work. The evidence clearly established that Mr. Seller had not only reported his refusal to drive to the employer but had also specified the reasons related to safety considerations, namely that he had run out of hours which would constitute a breach of safety regulations if he did not stop for rest.

As for the complainant's failure to contact a safety officer, the employer, in virtue of section 129(1), had the same obligation as the complainant to notify a safety officer and clearly made no effort to do so. Mr. Seller did call Labour Canada the following day. However, Mr. Book had already left, rendering any further investigation impossible. The employer, having itself short circuited the process, cannot reproach the complainant for not fulfilling a procedural requirement. (See John Charters et al. (1989), 76 di 188; and 3 CLRBR (2d) 253 (CLRB 727); Via Rail Canada Inc. (1989), 78 di 211 (CLRB no. 761); Michel Murray (1991), 84 di 134; and 15 CLRBR (2d) 116 (CLRB no. 855); Stan Butler (1991), 86 di 107 (CLRB 899); and Jean-Louis Bérubé (1991), 84 di 170 (CLRB no. 858).)

Based upon the evidence, the Board is of the view there was sufficient compliance with sections 128 and 129 of the Code for the complaint to be considered on its merits, provided that Mr. Seller was, in fact, dismissed.

V

The employer denied that it had dismissed the complainant and maintained that he had voluntarily left his job. However, when questioned at the hearing, Mr. Book admitted that Mr. Seller had never said "I quit"; this was simply an assumption on his part. It was his understanding that Mr. Seller wished to return to Winnipeg in the sleeper and had no plans to drive or continue working for the company. In any event, there was little discussion on this issue. Mr. Book told the Board he had no time to talk with Mr. Seller, argue or baby-sit with him. His principal concern was delivering the load to its destination in Calgary. He also added that had Mr. Seller been dismissed, he would have been obliged to return the company's fuel and telephone cards.

The complainant maintains that he was fired and abandoned at a truck stop in Denver, Colorado. Even if the Board accepts Mr. Book's testimony that he did not tell Mr. Seller he was dismissed, it is clear from the evidence that Mr. Book had no intention of returning to Canada with Mr. Seller. He unequivocally stated he would not take Mr. Seller as a passenger since the company's insurance coverage did not extend to passengers. However, nothing prevented him from bringing Mr. Seller back to Canada in the capacity of a co-driver. As such, Mr. Seller would not have been a passenger and could have remained in the sleeper. As for the obligation to return the company's credit cards, the employer's argument is not convincing. Such a requirement would apply irrespective of the reason Mr. Seller ceased working for Garden Grove. Finally, it is inconceivable that Mr. Seller voluntarily left his job in Denver, Colorado, with no financial means of returning home. The Board considers the complainant's explanation to be more probable than that of the employer and concludes that the complainant's employment was terminated by Garden Grove when he refused to continue to drive.

VI

It remains to be determined whether or not the dismissal was imposed as a reprisal because Mr. Seller exercised his right to refuse work in accordance with Part II of the Code.

Where a complaint of an alleged violation of section 147 is filed, pursuant to section 133(6), the complaint is itself evidence that a contravention actually occurred. If the employer alleges that the contravention did not occur, as in the present case, the employer assumes the burden of proof. (See Via Rail Canada Inc., *supra*; Patrick R. Ridge (1992), 88 di 20 (CLRB 934); and Jocelyn Simon et al. (1993), 91 di 1 (CLRB no. 988).)

To succeed, the employer must convince the Board that the termination of Mr. Seller's employment was totally unrelated to the fact he invoked his right to refuse unsafe work.

The employer attempted to show Mr. Seller as an incompetent employee. Examples included his previous employment history, his inability to adjust the truck's brakes, his improper recording of repair time and the fact that he had driven miles out of route. The employer, however, had never complained to Mr. Seller about these issues prior to his refusal to drive.

The employer then contended that although it had not terminated Mr. Seller's employment, there were sufficient grounds for doing so. The motives included a breach of the complainant's employment contract since he had abandoned the company's truck as well as the complainant's drive out of route which, according to the employer, caused him to be out of hours.

There is no substance to the allegation that the complainant abandoned the company's truck. As for the issue regarding the complainant's drive out of route, whether or not Mr. Seller would have gained a few more on-duty hours had he not gone out of route

is immaterial. At the time he invoked his right to refuse, he had virtually exhausted the maximum number of hours he could drive in his 8 day driving cycle and these hours, once recorded, could not be deleted. In the Board's view, all the rationalizations provided by the employer, after the fact, reinforced the Board's conclusion that Mr. Seller's employment was terminated by the employer in Denver, Colorado.

The testimony throughout the hearing was, for the most part, extremely contradictory. One of the few exceptions pertained to the permissible number of on-duty hours and the fact that Mr. Seller had few hours left to drive before being required to take the mandatory rest period.

The evidence clearly established that the reason invoked by Mr. Seller for not driving any further was related to safety considerations. The Board considers that the knowledge of the impending breach of a safety regulation was sufficient for Mr. Seller to have reasonable cause to believe that continuing to drive the company's truck constituted a danger to him.

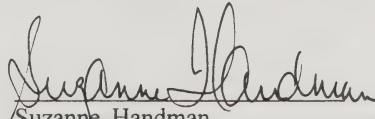
Furthermore, when Mr. Seller informed his employer he was "running out of hours", the employer required no explanation. Both the company's president and its transportation manager were well aware that Mr. Seller was referring to the applicable safety regulations. The employer also acknowledged that Mr. Seller had exceeded the permissible number of on-duty hours when he reached Denver, Colorado. The employer's sole pre-occupation, however, as expressed by both Mr. Behl and Mr. Book, was getting the load to the customer in Calgary, as scheduled. When Mr. Seller refused to continue driving, his employment was terminated.


In light of the evidence, the Board is satisfied that the termination of the complainant's employment was based upon his refusal to work in accordance with the Code and, in dismissing him, the employer contravened section 147(a)(iii).


Accordingly, the Board allows the section 133 complaint and pursuant to its remedial powers under section 134 of the Code, orders Garden Grove Produce Imports Limited to:

1. rescind the termination of the complainant's employment and reinstate Mr. Seller in his employment, if he so wishes, within 10 days of the date of this decision;
2. remove from Mr. Seller's file all references to his dismissal;
3. compensate Mr. Seller within 30 days of the date of this decision for all costs he incurred in order to return to Winnipeg from Denver, Colorado and for the loss of all wages and benefits he would have earned between his dismissal on January 3, 1995 and the date of his reinstatement, less any wages earned in the interval.

The Board appoints Mr. John Taggart, Labour Relations Officer, to assist the parties in resolving all questions arising from the foregoing remedies. If they are unable to agree, the Board retains jurisdiction over this matter and anything arising therefrom including, the issuance of a formal order to give effect to the said decision should the need arise.


Suzanne Handman
Vice-Chair


J. Philippe Morneault
Vice-Chair


Calvin B. Davis
Member

Information

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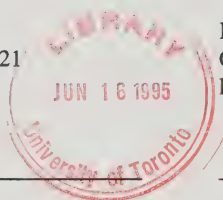
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Summary

Amalgamated Transit Union, Local 1374, applicant; and Greyhound Lines of Canada Ltd., and Extra Mile Enterprises Inc., employers.

Board File: 585-511
CLRB/CCRT Decision no. 1121
May 10, 1995



Résumé

Syndicat uni du transport, section locale 1374, requérant; et Greyhound Lines of Canada Ltd. et Extra Mile Enterprises Inc., employeurs.

Dossier du Conseil: 585-511
CLRB/CCRT Décision n° 1121
le 10 mai 1995

The union applied, pursuant to sections 44, 45, and 46 of the Code, for a declaration that there had been a sale of part of Greyhound's business to Extra Mile.

Extra Mile and Greyhound had entered into an agreement whereby Extra Mile operated pick-up and drop-off points for Greyhound courier parcels at two locations in the city of Calgary.

A precondition for the Board to grant an order, pursuant to section 45, is that both entities - Extra Mile and Greyhound - fall within federal jurisdiction for labour relations purposes.

After a review of the facts and the accepted jurisprudence the Board concluded that Extra Mile's operational activities do not bring it within federal jurisdiction.

The application was accordingly dismissed.

Dans cette affaire, le syndicat a présenté au Conseil une demande fondée sur les articles 44, 45 et 46 du Code afin que le Conseil déclare qu'une partie des activités de Greyhound avait été vendue à Extra Mile.

Greyhound et Extra Mile avaient conclu une entente selon laquelle Extra Mile assurait la cueillette et la livraison de colis pour le service de messagerie de Greyhound, à deux endroits à Calgary.

Pour que le Conseil puisse rendre une ordonnance en vertu de l'article 45 du Code, les relations de travail des deux entreprises, en l'instance Extra Mile et Greyhound, doivent être de compétence fédérale.

Après avoir examiné les faits et la jurisprudence du Conseil en cette matière, le Conseil a conclu que les activités opérationnelles de Extra Mile n'en font pas une entreprise fédérale.

La demande a donc été rejetée.

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Reasons for decision

Amalgamated Transit Union,
Local 1374,

applicant,

and

Greyhound Lines of Canada Ltd., and
Extra Mile Enterprises Inc.,

employers.

Board File: 585-511
CLRB/CCRT Decision no. 1121
May 10, 1995

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Mr. François Bastien and Ms. Véronique L. Marleau, Members.

Appearances:

Mr. William J. Johnson, for the Amalgamated Transit Union, Local 1374;
Messrs. Michael D.A. Ford and Mel F. Belich, for Greyhound Lines of Canada Ltd.;
and
Mr. Russell D. Albert, for Extra Mile Enterprises Inc..

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

I

Amalgamated Transit Union, Local 1374 (hereafter "ATU"), applied to the Board, pursuant to Sections 44, 45 and 46 of the Code, for a declaration that:

- (1) there has been a sale of a part of Greyhound Lines of Canada Ltd.'s (hereafter "Greyhound") business to Extra Mile Enterprises Inc. (hereafter "Extra mile"), and
- (2) the existing collective agreement between the ATU and Greyhound is binding on Extra Mile.

II

The relevant sections of the Code read as follows:

"44. (1) In this section and sections 45 and 46,

'business' means any federal work, undertaking or business and any part thereof;

'sell', in relation to a business, includes the lease, transfer and other disposition of the business.

(2) Subject to subsections 45(1) to (3), where an employer sells his business,

(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;

(b) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;

(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and

(d) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent.

45.(1) Where an employer sells his business and his employees are intermingled with employees of the employer to whom the business is sold, the Board may, on application to it by any trade union affected,

(a) determine whether the employees affected by the sale constitute one or more units appropriate for collective bargaining;

(b) determine which trade union shall be the bargaining agent for the employees in each such unit; and

(c) amend, to the extent the Board considers necessary, any certificate issued to a trade union or the description of a bargaining unit contained in any collective agreement.

(2) Where an employer sells his business and his employees are intermingled with employees of the employer to whom the business is sold, a collective agreement that affects the employees in a unit determined to be appropriate for collective bargaining pursuant to subsection (1) that is binding on the trade union determined by the Board to be the bargaining agent for that bargaining unit continues to be binding on that trade union.

(3) Either party to a collective agreement referred to in subsection (2) may, at any time after the sixtieth day has elapsed from the date on which the Board disposes of an application made to it under subsection (1), apply to the Board for an order granting leave to serve on the other party a notice to bargain collectively.

(4) On application being made to it pursuant to subsection (3), the Board shall take into account the extent to which and the fairness with which the provisions of the collective agreement, particularly those dealing with seniority, have been or could be applied to all the employees to whom the collective agreement is applicable.

46. Where any question arises under section 44 or 45 as to whether or not a business has been sold or as to the identity of the purchaser of a business, the Board shall determine the question."

III

At the outset of the hearing, in a display of professionalism and cooperation which endured throughout, Counsel for the parties agreed to the following statement of facts:

"AGREED STATEMENT OF FACTS

1. *Greyhound Lines of Canada Ltd. ('Greyhound'), is an inter-provincial bus line which provides passenger and parcel transport throughout Canada, and is a federal undertaking within the meaning of the Canada Labour Code, R.S.c. 1985, c.L-2 ('Canada Labour Code').*

2. *Extra Mile Enterprises Inc. ('Extra Mile') was incorporated under the Business Corporations Act of Alberta, originally as a numbered company (569359 Alberta Ltd.), on June 2, 1993. The company name was formally changed to Extra Mile Enterprises Inc. in July of 1993. Extra Mile commenced its business of providing freight and courier service exclusively within the municipality of Calgary, Alberta, on July 19, 1993. As of November 1, 1994, Extra Mile began selling Greyhound passenger tickets from its premises.*

3. *Extra Mile operates out of two locations within the municipality of Calgary, Alberta, namely:*

<u>Location</u>	<u>Date Operations Commenced</u>
(a) #1, 2520 - 23 Street N.E. Calgary, Alberta T2E 8L2	July 19, 1993
(b) 625 Manitou Road S.E. Calgary, Alberta T2G 4C2	November 23, 1993

4. By Canada Labour Relations Board Certificate 530-1505 as amended by 530-1873, the Canada Labour Relations Board certified the Amalgamated Transit Union, Local 1374 ("ATU") as the collective bargaining agent for a bargaining unit described as follows:

'All employees, including owner-operators of Greyhound Lines of Canada Ltd., excluding its Eastern Division employees and excluding general office employees, supervisors and those above employed at the Calgary head office, regional managers, assistant regional managers, district managers, assistant district managers, city sales manager, depot managers, assistant depot managers, garage foremen, district supervisors, operation supervisors, charter representatives, assistant charter representatives, regional and district secretaries, and commissioned agents.'

Copies of Certificate No. 530-1505 and Amending Certificate No. 530-1873 are attached hereto as Exhibits '1' and '2' respectively.

5. *Greyhound and the ATU are parties to a collective agreement dated January 1, 1994 (the 'Collective Agreement') which governs the relationship between them. Attached hereto as Exhibit '3' is a copy of the Collective Agreement.*

6. *To facilitate its inter-provincial business of passenger and parcel transportation, Greyhound owns a number of terminal facilities in various locations between Vancouver, British Columbia and Sudbury, Ontario (with connections to the USA), including a terminal in downtown Calgary, Alberta.*

7. *The terminal located in downtown Calgary carries out a number of activities, including the following:*

- (a) inter-provincial envelope, courier, freight and passenger transport by means of bus, semi-trailer and van;*
- (b) provision of charter transportation services and related services;*
- (c) selling bus tickets to passengers;*
- (d) loading and unloading passengers and luggage on and off buses;*
- (e) accepting envelopes, courier and freight parcels;*

- (f) *handling and sorting all inbound package express for entire City of Calgary;*
- (g) *forwarding courier and freight parcels to specified destinations;*
- (h) *pick-up and delivery of parcels to customer locations;*
- (i) *sorting envelopes, parcels and packages;*
- (j) *limited cleaning of buses;*
- (k) *notification of delivery receipt and telephone contact with customers;*
- (l) *loading and unloading of semi-trailers;*
- (m) *transferring freight from truck to truck, from truck to bus and bus to truck; and*
- (n) *parcel tracing and handling customer complaints.*

8. *In addition to its own terminals, Greyhound also utilizes the services of approximately 550 commissioned agents throughout Canada. Section 77 of the Collective Agreement reads as follows:*

AGREEMENT NOT TO APPLY TO COMMISSION AGENTS

This agreement shall not apply to Commission Agents, any of their employees nor any of their Owner/Operators. Company GCX Owner/Operators are not commission agents.

9. *In 1993, Greyhound decided to engage the services of an entity to operate as a pick up and drop off point for Greyhound courier parcels in the southeast and northeast portions of the City of Calgary.*

10. *Greyhound advised its then general manager, Ms. Carol Chuback, to investigate and secure a suitable entity for the northeast area of Calgary. Because of her own personal wishes, she expressed an interest in creating that entity herself. This led to discussions between herself and Greyhound, eventually culminating in the creation of Extra Mile.*

11. *After the creation of Extra Mile on June 2, 1993 Greyhound entered into a contractual relationship with Extra Mile respecting the services set out in paragraph 19 herein and the subsequent selling of Greyhound passenger tickets.*

12. *Greyhound and Extra Mile entered into written agreements in 1994 respecting the northeast and southeast Extra Mile locations, and attached hereto as Exhibit '4' and Exhibit '5' are copies of the respective agreements.*

13. *Carol Chuback is the sole shareholder of Extra Mile. There is no corporate relationship between Extra Mile and Greyhound.*

14. *The premises utilized by Extra Mile are leased by Greyhound, and the agreement grants Extra Mile a license to occupy those premises during the duration of the Agreement.*

15. *In carrying out its business, Extra Mile has a number of assets including office furniture, computer equipment, vehicles, and other miscellaneous office equipment. In its business Extra Mile also utilizes a weigh scale and a point of sale computer system, which is Greyhound equipment. Weigh scales are supplied by Greyhound to ensure weighing consistency. The computer system supplied to Extra Mile by Greyhound hooks Extra Mile into a system shared by all point of sale agents utilized by Greyhound.*

16. *The sign above Extra Mile's premises reads 'Greyhound Courier Express'. Below and to the side of the entrance door is stencilled 'Greyhound Courier Express operated by Extra Mile Enterprises'. The signage is in standard Greyhound colours.*

17. *Extra Mile originally began its operations with two employees, aside from Ms. Chuback. These employees were Tony San Gregorio and Joan McKenzie. Although both of these employees were previously Greyhound employees, they voluntarily resigned from Greyhound in order to take up their new positions with Extra Mile. Since commencing operations, Extra Mile has taken on six new permanent employees. Prior to commencing work with Extra Mile, Ms. Chuback had arranged for her resignation from Greyhound in order that she could commence operations of Extra Mile immediately thereafter. In addition, Tony San Gregorio and Joan McKenzie*

also advised Greyhound of their resignations on the basis that they would be leaving to commence with Extra Mile upon their resignations.

18. Greyhound employees involved in its freight and courier operations wear a standard Greyhound uniform; Extra Mile employees do not wear Greyhound uniforms.

19. Respecting the freight and courier portion of Extra Mile's operations, it is involved in shuttling parcels from Extra Mile's locations to Greyhound's Calgary downtown terminal, and vice-versa, and Extra Mile provides a location where customers may drop off and pick up parcels destined for transportation by Greyhound. Specifically, Extra Mile's freight and courier business includes the following:

(a) Outbound Envelopes, Parcels and Packages

- (i) receiving parcels from customers who choose to utilize Extra Mile services; and*
- (ii) shuttling parcels using Extra Mile vans to Greyhound's main terminal, where Greyhound transports the parcels to locations specified by customers.*

(b) Inbound Envelopes, Parcels and Packages

- (i) picking up parcels from Greyhound's downtown terminal which are destined for pick-up by the customer at the Extra Mile facility;*
- (ii) shuttling these parcels to the Extra Mile location in either the northeast or southeast location; and*
- (iii) advising customers they can pick up parcels from the Extra Mile facility and providing counter service on-site for pick up.*

20. Extra Mile employees do not attend at a customer's location, whether business or residence, unlike Greyhound owner/operators providing parcel and delivery service." ...

The facts, as agreed to, were augmented by the viva voce testimony of a number of witnesses.

IV

At the conclusion of the hearing, the Board was left with three issues to address:

1. Whether Extra Mile is a federal undertaking within the meaning of the Constitution Act;
2. whether there has been a sale of a severable part of Greyhound's business to Extra Mile; and,
3. finally, whether Extra Mile is operating as a commissioned agent and therefore excluded from the scope of the bargaining certificate issued to the ATU.

In light of the Board's determination on the jurisdictional question it will not be necessary to deal with the last two issues.

V

A precondition for the Board to be in a position to declare that a sale of business, pursuant to section 44 of the Code, has taken place, is that both entities, Extra Mile and Greyhound, fall within federal jurisdiction for labour relations purposes.

Section 44(1) of the Code defines "business" as:

"... any federal work, undertaking or business and any part thereof;"

The definition of "*federal work, undertaking or business*" is found in section 2 of the Code:

"2. In this Act,

'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,

...

(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces," ...

The regulation of Labour relations falls within provincial jurisdiction under "Property and Civil Rights" (section 92(13) of the Constitution Act, 1867) unless it is shown that it forms an integral part of federal primary jurisdiction over a federal subject under section 91 of the Constitution Act, 1867. An undertaking falls within federal jurisdiction in two cases: it may, in itself, be a federal undertaking, or it may be an integral part of a core federal undertaking.

Extra Mile is clearly not in itself a federal transportation undertaking within the meaning of section 2(b) of the Code. Its business of providing freight and courier services exclusively within the confines of the municipality of Calgary is *per se* provincial in nature. Extra Mile will therefore only fall within federal jurisdiction only if its activities form an integral part of Greyhound - the core federal undertaking engaged in interprovincial transportation.

The Supreme Court of Canada outlined the process involved in examining this second possibility, as follows:

"...the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, ... to look at the 'normal or habitual activities' of that department as 'a going concern', and the practical and functional relationship of those activities to the core federal undertaking."

(Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3d) 1; and 79 CLLC 14,211 (Northern Telecom no. 1) pages 133; 14; and 143)

The applicable test to determine whether a particular subsidiary operation forms an integral part of a core federal undertaking has been established in Northern Telecom no 1, supra:

"On the basis of the foregoing broad principles of constitutional adjudication, it is clear that certain kinds of 'constitutional facts', facts that focus upon the constitutional issues in question, are required. Put broadly, among these are:

- (1) the general nature of Telecom's operation as a going concern and, in particular, the role of the installation department within that operation;*
- (2) the nature of the corporate relationship between Telecom and the companies that it serves, notably Bell Canada;*
- (3) the importance of the work done by the installation department of Telecom for Bell Canada as compared with other customers;*
- (4) the physical and operational connection between the installation department of Telecom and the core federal undertaking within the telephone system and, in particular, the extent of the involvement of the installation department in the operation and institution of the federal undertaking as an operating system."*

(pages 135; 15-16; and 144)

These criteria, and particularly the aspect of operational integration, were further developed by the Supreme Court of Canada in United Transportation Union v. Central

Western Railway Corporation, [1990] 3 S.C.R. 1112; (1990), 76 D.L.R. (4th) 1; and 91 CLLC 14,006. The essential element of that test is that the subsidiary operation must be characterized as "vital", "essential" or "integral" to the core federal undertaking in order to fall within federal jurisdiction.

In the present case, the determining factor is therefore the physical and operational connection between Extra Mile and the core federal undertaking: Greyhound (see Northern Telecom Canada Limited et al. v. Communications Workers of Canada et al., (Northern Telecom no. 2), [1983] 1 S.C.R. 733; (1983), 147 D.L.R. (3d) 1); and, in particular, the extent of the involvement of Extra Mile in the operation of Greyhound as an interprovincial transportation business.

More specifically, the Board must determine whether Greyhound, the core federal undertaking, is so operationally dependent on Extra Mile that it would be severely disadvantaged if Extra Mile's employees failed to perform their usual tasks:

"Both the Stevedores' Reference and Letter Carriers' cases indicate that dependence of a core federal work or undertaking upon a group of workers tends to support federal jurisdiction over those workers. In subsequent judgments of this Court, this jurisdictional test has been elaborated upon. Prime among these more recent decisions is Northern Telecom Ltd. v. Communications Workers of Canada, [1980] 1 S.C.R. 115 (Northern Telecom No.1), where this Court considered the proper interpretation and application of sections 2 and 4 of the Canada Labour Code. ..."

(Central Western Railway Corporation, supra, pages 1138; 17-18; and 12,053-12,054; emphasis added)

VI

The process of determining constitutional jurisdiction begins with an examination of the nature of the subsidiary operation's normal or habitual activities as a going

concern. The employees of Extra Mile are primarily engaged in moving or arranging for the movement of its customers' freight between its two locations in Calgary and Greyhound's downtown terminal. The only other service provided by Extra Mile, as of November 1, 1994, is the sale of Greyhound passenger tickets from its locations. Extra Mile's operations are confined to the purely local business of providing freight and courier service within the city of Calgary. Other than shuttling parcels between Greyhound's terminal and its facilities, Extra Mile is not involved in other kinds of transportation of parcels. Essentially, it merely provides a convenient location where incoming parcels can be picked up or parcels to be shipped can be dropped off for forwarding to Greyhound's downtown terminal.

The second criterion enunciated in Northern Telecom no. 1, supra, is easily addressed. As indicated in paragraph 13 of the agreed statements of facts, the nature of the corporate relationship between Extra Mile and Greyhound is that of an essentially unrelated company. Although Extra Mile utilizes some Greyhound equipment and office space to facilitate consistency and basic integration of the parcel pick-up and delivery operation, there is clearly no corporate relationship between Extra Mile (and its sole shareholder, Ms. Carol Chubak) and Greyhound.

The third element of the constitutional test, i.e. the importance of the work done by Extra Mile for Greyhound as compared with other customers, is equally uncomplicated to determine. Extra Mile's only business emanates from Greyhound; it does not offer services to any other companies. It receives parcels from Greyhound's customers - who choose to utilize Extra Mile services at one of its two locations - and shuttles them to the downtown terminal. Alternatively, it picks up parcels which are destined for pick-up by Greyhound's customers at an Extra Mile location, from Greyhound's downtown terminal.

Pursuant to the agreement between Extra Mile and Greyhound, the latter pays Extra Mile a percentage commission for every freight item transported. And, if Extra Mile intends to carry on other businesses from its two locations, it must obtain the written

consent of Greyhound. In short, the importance of the work done by Extra Mile for Greyhound in Calgary is not insignificant.

The final element of the test requires us to assess the physical and operational connection between Extra Mile and Greyhound. In order for federal jurisdiction to apply to its labour relations, Extra Mile's operation must be capable of being categorized as being "vital", "essential" or "integral" to Greyhound's federal undertaking.

In our view, the work done by Extra Mile for Greyhound, although important, is neither vital or essential. Extra Mile's operations are in no way managed or supervised by Greyhound. With the exception of scales and the point of sale computer, Extra Mile utilizes its own equipment to operate its business (vehicles, machinery, etc.) . Neither is the work done by Extra Mile essential to the operation of Greyhound. The evidence demonstrates that Greyhound customers can pick up or drop off parcels directly at the Greyhound downtown terminal without utilizing Extra Mile's services. As well, Extra Mile does not directly pick-up or deliver parcels to Greyhound customers. That aspect is performed by Greyhound's owner operators.

The limited communications between Greyhound and Extra Mile dealing with periodical marketing meetings and problems related to scheduling or sorting are not sufficient to lead us to conclude that there is an intimate operational connection between the two businesses. Greyhound has operated in the past, and could well do so in the future, without the operational involvement of Extra Mile (Central Western Railway Corporation, supra). It is apparent that although Greyhound entered into the agreement with Extra Mile in order to both increase its market share in the parcel transport business - and ultimately improve its customer service in its ticket sales - it cannot be said that Greyhound's operation is integrated with Extra Mile to such an extent as to make the operation of Extra Mile vital, essential or integral to the continued operation of Greyhound.

The present case is clearly distinguishable from Clermont Terminals Ltd. (Letter Decision dated May 17, 1989, Board Files 585-214 and 565-343), and Miwy Co. Ltd., [1984] OLRB Rep. Sept. 1249 where the Board found that the entities at issue were subject to federal jurisdiction. In those cases, it was found that the activities of the entity engaged in operating the terminal were vital and essential to Greyhound's business **because of the regular maintenance activities** they provided to Greyhound; and, in the case of Miwy Co. Ltd., *supra*, the presence of Greyhound employees at the terminal . Although these types of situations need be evaluated on a case by case basis, the present case is perhaps better compared with the circumstances and facts of Alliance Agencies Ltd. and Raynor Holdings & Investments Ltd. (1988), 73 di 104 (CLRB no. 676). There the Board found that Alliance Agencies, a business related to Greyhound in respect of its operations at the New Westminster, B.C. terminal, was not under federal jurisdiction because:

"... At these terminals there is no Greyhound presence in the day-to-day operations. There are no Greyhound employees, no Greyhound administrative offices, no maintenance facilities for Greyhound buses, no dispatch and no refuelling operations. Alliance employees perform none of these functions that are vital and essential to Greyhound's operations, they only deal with the commodities being transported by Greyhound and other carriers using its facilities, i.e., passengers and parcels. Alliance is certainly dependent upon the commissions it receives from Greyhound for handling these commodities and providing other services like the waiting rooms and toilet facilities for passengers but that does not necessarily mean that federal jurisdiction goes along with that dependence. Many provincial entities depend on business from federal works, undertakings or businesses for their income and vice-versa. This is not a relevant consideration."

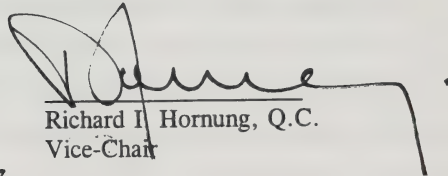
(pages 111-112)

In the present case there is no Greyhound presence or control in the day-to-day operations of Extra Mile's terminals; no Greyhound administrative offices at the terminal; no maintenance facilities for Greyhound buses; no dispatch and no refuelling operations. These factors, along with those already mentioned, lead us to conclude

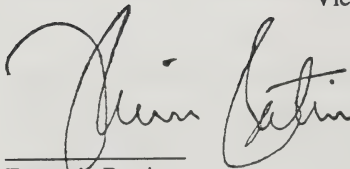
that Extra Mile is simply not essential to Greyhound's interprovincial transportation operations.

VII

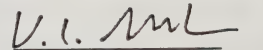
In the result, the Board has determined that the facts adduced do not bring Extra Mile within federal jurisdiction for the purpose of labour relations. The application is therefore dismissed.



Richard I. Hornung, Q.C.
Vice-Chair



François Bastien
Member



Véronique L. Marleau
Member

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Summary

Helder R. De Oliveira, *complainant*, Teamsters Local Union 938 of the Canada Council of Teamsters, *respondent*, and Purolator Courier Ltd., *employer*.

Board File: 745-4927
CLRB/CCRT Decision no. 1122
June 6, 1995

Résumé

Helder R. De Oliveira, *plaignant*, section locale 938 des Teamsters affiliée au Conseil canadien des Teamsters, *intimée*, et Purolator Courrier Ltée, *employeur*.

Dossier du Conseil: 745-4927
CLRB/CCRT Décision n° 1122
le 6 juin 1995

Mr. Helder R. De Oliveira filed a complaint with the Canada Labour Relations Board alleging that his union, Teamsters Local Union 938 of the Canada Council of Teamsters, had contravened section 37 of the Canada Labour Code.

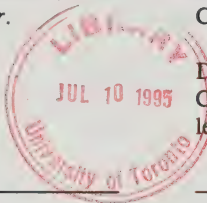
Mr. De Oliveira alleges that the union did not properly represent him in handling five grievances he had filed over a 10-month period. These grievances resulted in nine days of suspension from work, and a warning by the employer that any further disciplinary action could result in dismissal.

The Board finds that the evidence was clear that the union representative only considered and believed the employer's side of the story when he decided that the grievances had no merit. As well, no investigation was conducted to consider whether or not Purolator's allegations were inaccurate. The way the representative handled Mr. De Oliveira's grievances was such that it was arbitrary and placed the union in the position of violating section 37 of the Code.

M. Helder R. De Oliveira a déposé une plainte auprès du Conseil canadien des relations du travail alléguant que son syndicat, la section locale 938 des Teamsters affiliée au Conseil canadien des Teamsters, avait enfreint l'article 37 du Code canadien du travail.

Le plaignant allègue que le syndicat ne l'a pas bien représenté dans son traitement des cinq griefs qu'il avait présentés au cours d'une période de 10 mois. Ces griefs se sont soldés à neuf jours de suspension et un avertissement de l'employeur selon lequel toute autre mesure disciplinaire pourrait entraîner un congédiement.

Le Conseil juge que, selon la preuve, le représentant syndical n'a tenu compte que de la version de l'employeur et n'a cru que l'employeur lorsqu'il a décidé que les griefs étaient sans fondement. De plus, le syndicat n'a pas mené d'enquête afin de déterminer si oui ou non les allégations de Purolator étaient inexactes. La façon dont le représentant a traité les griefs de M. De Oliveira était arbitraire et a placé le syndicat dans une position qui fait qu'il a violé l'article 37 du Code.



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LES MOTIFS DE DECISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Helder R. De Oliveira,

complainant,

and

Teamsters Local Union 938 of the Canada
Council of Teamsters,

respondent,

and

Purolator Courier Ltd.,

employer.

Board File: 745-4927

CLRB/CCRT Decision no. 1122

June 6, 1995

The Board was composed of Mr. Jean L. Guilbeault, Q.C./c.r., Vice-Chair, and Messrs. Calvin B. Davis and Patrick H. Shafer, Members. A hearing was held on April 11, 12 and 13, 1995, at Toronto, Ontario.

Appearances

Mr. Barrie W. Carlyle, counsel, for the complainant;

Ms. Linda Huebscher, counsel, for the respondent union; and

Ms. Sharon Kehoe, Human Resources Manager, for the employer.

These reasons for decision were written by Mr. Calvin B. Davis, Member.

Mr. Helder R. De Oliveira filed a complaint with the Canada Labour Relations Board alleging that his union, Teamsters Local Union 938 of the Canada Council of Teamsters, had contravened section 37 of the Canada Labour Code.

Section 37 reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

The complainant alleges that the union did not properly represent him in handling the five grievances he had filed over a 10-month period. These grievances resulted in nine days of suspension from work, and a warning that any further disciplinary action could result in dismissal.

Mr. De Oliveira has worked as a courier for Purolator Courier Ltd. (Purolator) or one of its predecessor companies for 17 years. His problems with his present employer escalated after the Courier Action Team was formed. This committee consists of a group of drivers who get together with management to discuss how to increase productivity. Some employees were for the committee, and others against it. For its part, the union did not oppose the formation of the committee. The complainant was against it, for he believed the committee was a threat to job security. His worst fear came true as his run was eliminated. He protested to management, but they said they were taking measures to improve working conditions and increase productivity. He also complained to the union about the elimination of his route because of what he believed were the actions of the committee.

From November 5, 1993 to August 3, 1994, Mr. De Oliveira filed five grievances which are the subject of this complaint. The grievances were discussed with the employer at grievance meetings. However, no decision as to their final disposition was made at that time. When the complainant asked the union what was happening to the grievances, he was advised by letter dated September 28, 1994 that the union would not be proceeding any further.

Mr. Wayne Maslen is the Teamsters representative for the employees of Purolator and of several other transportation companies. He has been a representative for eight years and been responsible for servicing Purolator since the fall of 1993, including the application of the grievance procedure. He explained that normally the grievance is discussed between management and the employee. If the grievance cannot be sorted out, it is put in writing and then given to a steward who will attempt to resolve it with management. If this attempt is unsuccessful, a grievance meeting is held.

The grievance meetings are usually informal and constitute a fact-finding mission where questions are asked of the griever who is free to speak and make comments. After the meeting, the management representative will normally respond within days to the grievance. However, there is an understanding between the parties that the time frame involved in processing grievances is waived. More often than not, responses from one side or the other are not provided within the time limits in the collective agreement.

Mr. Maslen did not know Mr. De Oliveira. He remembers meeting him the first time just before the initial grievance meeting with management. And he was not familiar with the complainant's previous history with the union or the predecessor company. He attended the meetings where Mr. De Oliveira's grievances were discussed with management. He took notes at the meetings and asked questions during the discussion between Mr. De Oliveira and management.

Mr. De Oliveira's grievances dated November 5, December 2 and December 8, 1993 were all dealt with at a grievance meeting held on March 25, 1994.

With regard to the November 5 grievance alleging harassment and discrimination, Mr. Maslen believed that Mr. De Oliveira's grievance had no merit.

The December 2 grievance resulted in a one-day suspension because Mr. De Oliveira had refused to work at the employer's Logan Street location. Mr. Maslen advised Mr. De Oliveira at the grievance meeting that he should have gone to work when he was told and filed a grievance later rather than walking out. Mr. Maslen believed that the complainant, by acting the way he did, had no valid reason to file a grievance.

The December 8 grievance pertained to a warning letter the employer had sent to Mr. De Oliveira. The complainant had called in sick; however, the employer felt that the complainant had not followed the proper procedure and subsequently issued a written warning. Mr. Maslen believed that Mr. De Oliveira knew the call-in procedure but failed to follow it.

The fourth grievance, dated May 13, involved a three-day suspension Mr. De Oliveira received for not keeping four 9 a.m. service commitments. Service failures are totally unacceptable to the employer. The proper procedure according to the employer had been discussed with him in the past.

According to Mr. Maslen's experience from his dealings with Purolator, all couriers know they are to deliver 9:00 a.m. packages by or around 9:00 a.m. without exception and without receiving daily instructions to do so. Mr. De Oliveira was not correct in assuming that he did not have to deliver 9:00 a.m. packages at 9:00 a.m. unless he was advised each and every day. In addition, the complainant's statement to the effect that he had left the yard at 8:06 a.m. was not accurate as the computer indicated that the complainant had departed at 8:20 a.m. Mr. Maslen felt that this grievance had no chance of success.

Mr. De Oliveira's fifth grievance pertained to a five-day suspension handed out by the employer as a result of incidents that occurred on July 20, 21 and 22, 1994. On July 20, the employer claimed that the complainant had breached the Return Shipment policy as he had returned packages to shipping without authorization to do so. On

Friday, July 22, 1994, the complainant had again breached the Return Shipment policy. According to the employer, freight had not been scanned before Mr. De Oliveira left the depot. This was considered a serious breach of security.

Mr. Maslen could not substantiate Mr. De Oliveira's version regarding the July 20 and 21 incidents. With respect to the July 22 incident, it is Mr. Maslen's experience that, in accordance with Purolator's standard procedure, couriers must scan all freight on their vehicles before leaving the depot. Mr. Maslen also felt this grievance had no merit. However, he kept the channels of communication open with the employer in hopes of having the grievances overturned or the suspensions reduced. Indeed, Mr. Maslen was successful in securing a favourable wage adjustment for Mr. De Oliveira when he grieved he had not been properly paid.

The Supreme Court of Canada stated in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(pages 527; emphasis added)

In that decision, the Supreme Court made it quite clear that before a union decides not to proceed with a grievance it must conduct "a thorough study of the grievance and the case taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other."

Mr. De Oliveira's grievances, in particular those dealing with discipline, are of a serious nature. (See André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319).) The employer's letters informing the complainant of disciplinary measures make it clear that he was headed towards termination. Thus the disciplinary grievances were of a nature to be seriously considered by the union.

The evidence showed that Mr. Maslen, when deciding not to proceed with Mr. De Oliveira's grievances, only took into consideration the employer's side of the story. No doubt Mr. Maslen was familiar with Purolator's policies and practices. However, he did not conduct an investigation to ensure that the employer's practices at Mr. De Oliveira's work place were identical to the ones with which he was acquainted.

For instance, over the issue of scanning, Mr. Maslen was quite sure that, according to company policy, all goods had to be scanned before they were loaded on the truck. One witness told the Board this was so, while another witness said there were cases where freight was not scanned before it was loaded and gave a few examples.

With regard to the over-time delivery policy, once again no investigation was carried out to see if Mr. De Oliveira's version was actually true or not. Management's version was accepted. The same holds true for Mr. De Oliveira's claim that he called in to speak to his supervisor when he could not deliver goods by the end of the day. Mr. Maslen automatically accepted the supervisor's version.

According to Mr. Maslen, he had problems getting Mr. De Oliveira's version. He stated that he had learned of Mr. De Oliveira's evidence during the grievance meetings, and that it was difficult to investigate a matter when evidence is obtained well after the incident occurred. This is probably true. In this case, there was very little discussion with Mr. De Oliveira before the grievance meetings to get his side of the story. And it would certainly be hard to carry out an investigation when some of the grievances were dealt with months after they were filed.

Mr. Maslen also claimed that he would not go to non-union personnel to get their version. For instance, he would not speak to the receptionist to see if in fact Mr. De Oliveira had called in when he was unable to deliver the parcels before quitting time. This is quite understandable. However, when an individual's job is on the line it is not good enough to take just management's word. For instance, nothing prevented Mr. Maslen from calling the customer, Royal Rehab, and confirming whether or not Mr. De Oliveira had attempted to call in. Mr. Maslen said that he had become aware that Royal Rehab had sent a letter that apparently corroborated Mr. De Oliveira's version only after the complaint was filed with the Board. The complainant on the other hand claimed that he had told Mr. Maslen and management at the grievance meeting they should get hold of Royal Rehab to confirm his story. After hearing management's side of the story, it was incumbent upon Mr. Maslen to at least discuss matters with Mr. De Oliveira to see if he had any witnesses or evidence to justify his version.

Another aspect the Board will look at before finding a violation of section 37 is the "clean hands" theory. Did Mr. De Oliveira assist the union in resolving his grievances?

The evidence showed Mr. De Oliveira to be a stubborn individual. In fact, the complainant admitted that when he has a point of view he is not easily swayed. Furthermore, he is not shy about expressing his dissatisfaction with things at the work place. He obviously did not like the way Purolator conducted its affairs and was prepared to say so. It is easy to conclude that he was a thorn in the employer's side.

However, the complainant's attitude and demeanour did not prevent Mr. Maslen from conducting a thorough investigation of the grievances. Although an attempt was made to prove that Mr. De Oliveira was withholding information from the union, this was not the case. When management presented its reasons for disciplining Mr. De Oliveira, there was no attempt by the union representative to speak to Mr. De Oliveira to get his side of the story. Indeed, according to the way that Mr. Maslen carries out an investigation, the grievance meeting might well be the only place a grievor can initially present whatever evidence he has.

The Board is cognizant of the fact that the Teamsters and Purolator enjoy an excellent working relationship. There is nothing wrong with the union and the employer working together to resolve their differences. However, before accepting the employer's version, the union must ensure that the employer has not somehow got things wrong, especially when a person's job is at stake. This does not mean that the employer should never be believed.

Mr. Maslen did not conduct an investigation. He only took into consideration what was said at the grievance meeting and believed management. He may have discussed the circumstances of Mr. De Oliveira's grievances with other business agents of the union, but he never spoke with anyone at the depot to see if there was any substance

to the grievances or that practices in effect differed from practices at other Purolator depots.

The evidence is clear: Mr. Maslen only considered and believed the employer when he decided the grievances had no merit; he did not conduct an investigation of Purolator's allegations; and his handling of Mr. De Oliveira's grievances was so perfunctory as to have been arbitrary and to have placed the union in the position of violating section 37 of the Code.

For all these reasons, the Board allows the complaint and issues the following orders:

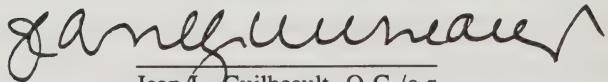
- (1) The Canada Council of Teamsters will refer to arbitration, within 15 days of the present decision, the complainant's grievances dated November 5, 1993 (allegations of harassment and discrimination), December 2, 1993 (one-day suspension), December 8, 1993 (warning letter), May 13, 1994 (three-day suspension) and August 3, 1994 (five-day suspension). Any time limits which might have the effect of hindering such a referral are waived.
- (2) Mr. De Oliveira is entitled to engage counsel of his choice to carry the grievances to arbitration and through the arbitration process.
- (3) The reasonable fees, costs, and expenses of such counsel will be paid by the respondent union.
- (4) The employer is responsible for the payment of lost wages.

Should the arbitrator make a finding concerning lost wages, Mr. De Oliveira's counsel suggested the union should be held responsible. The union felt the employer should pay them, while the employer argued that it should not be responsible for lost wages.

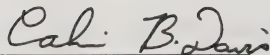
In this type of situation, the Board looks at the circumstances case by case. In this particular case, we note that the employer freely waived time limits to process grievances. Thus, if the union referred a grievance to arbitration long after a time limit had expired, the employer would likely not claim it was time-barred. Therefore, we cannot now see why the employer should not be held responsible for the payment of lost wages in the event Mr. De Oliveira is successful.

The Board shall retain jurisdiction over any question that might arise in implementing this decision and appoints Mr. Peter Suchanek, Director of the Toronto office, or any person he may designate to assist the parties as required. Nothing in the remedy prevents the parties from reaching an amicable settlement before the arbitration proceedings gets under way.

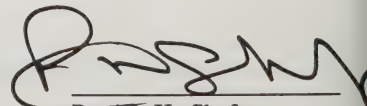
This is a unanimous decision.



Jean L. Guilbeault, Q.C./c.r.
Vice-Chair



Calvin B. Davis
Member



Patrick H. Shafer
Member

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Summary

Communications, Energy and Paperworkers Union of Canada, *complainant*, and VOCM Radio Newfoundland Limited and VOCM News Inc., *respondents*.

Board Files: 745-5049
745-5058

CLRB/CCRT Decision no. 1123
May 29, 1995

The Board is dealing with two unfair labour practice complaints alleging violations of sections 94(1), 94(3)(a) and 94(3)(e) of the Canada Labour Code (Part I - Industrial Relations). The first complaint alleges that the employer violated the Code when it held certain meetings with its employees relative to the union's organizing campaign. The second complaint, filed days later, alleges that the employer violated the Code when it laid off eight employees.

The Board reiterated its policies with respect to captive audience meetings and to terminations of employment during a union organization drive.

It found that the employer had violated sections 94(1)(a), 94(3)(a) and 94(3)(e) and ordered the reinstatement of the laid-off employees with compensation as well as a range of remedies to nullify the effects of the captive audience meetings.

Résumé

Syndicat canadien des communications, de l'énergie et du papier, *plaignant*, ainsi que VOCM Radio Newfoundland Limited et VOCM News Inc., *intimées*.

Dossiers du Conseil: 745-5049
745-5058

CLRB/CCRT Décision n° 1123
le 29 mai 1995

En l'espèce, le Conseil doit trancher deux plaintes de pratique déloyale de travail alléguant violation des alinéas 94(1), 94(3)(a) et 94(3)(e) du Code canadien du travail (Partie I - Relations du travail). Dans la première plainte, le syndicat allègue que l'employeur a enfreint le Code lorsqu'il a tenu des réunions avec ses employés concernant la campagne de recrutement du syndicat. Dans la seconde plainte, déposée quelques jours plus tard, le syndicat allègue que l'employeur a enfreint le Code lorsqu'il a mis huit employés à pied.

Le Conseil réitère ses politiques portant sur la tenue de réunions à auditoires contraints et sur les licenciements au cours d'une campagne de syndicalisation.

Il juge que l'employeur a enfreint les alinéas 94(1)(a), 94(3)(a) et 94(3)(e) et ordonne la réintégration et le dédommagement des employés mis à pied ainsi qu'une gamme de mesures de redressement en vue d'annuler les conséquences des réunions à auditoires contraints.

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LES MOTIFS DE DECISION DU CCRT SONT
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Reasons for decision

Communications, Energy and Paperworkers
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complainant,

and

VOCM Radio Newfoundland Limited, and
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Board Files: 745-5049
745-5058

CLRB/CCRT Decision no. 1123

May 29, 1995

The Board consisted of Mr. J. Philippe Morneault, Vice-Chairman and Mr. Calvin B. Davis and Ms. Sarah E. FitzGerald, Members.

The hearing was held on May 9 to May 12, 1995 in St. John's, Newfoundland.

Appearances:

Mr. Ronald A. Pink, Q.C., assisted by Mr. Barney Dobbin, National Representative, CEP for the complainant;

Mr. Darren C. Stratton, Esquire, assisted by Mr. John Murphy, General Manager, VOCM Radio, for the respondents VOCM Radio Newfoundland Limited and VOCM News Inc.

These reasons for decision were written by Mr. J. Philippe Morneault, Vice-Chairman.

I

The Board is dealing here with two complaints of unfair labour practice filed by the Communications, Energy and Paperworkers Union of Canada (the Union or the complainant) against VOCM Radio Newfoundland Limited (the respondent or the employer) and VOCM News Inc. (interchangeably the employer or the respondent). The first complaint, file 745-5049, filed with the Board on March 31, 1995 is to the effect that the employer violated the provisions of sections 94(1), 94(3)(a)(i) and 94(3)(e) when it held meetings with its employees for the purpose of discussing the union organizing campaign. The second complaint, file 745-5058, filed with the Board on April 10, 1995, is to the effect that the employer violated the provisions of sections 94(1), 94(3)(a)(i) and (iii), 94(3)(e)(i) and (iii) by providing lay-off notices to eight employees and laying off these eight employees and providing them with a severance package, provided they sign releases.

At the hearing, the solicitor for the respondents stated that VOCM News Inc., the employer of some of the laid off employees, would not provide a separate defence to these charges but would be bound by any order issued by the Board.

II

The relevant sections of the Code read as follows:

"94. (1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

...

(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

...

(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

...

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

...

(iii) making an application or filing a complaint under this Part;

...

97.(1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that

(a) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 50, 69, 94 or 95; or

...

98. (4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

III

The bare facts which are material to these complaints are as follows. On Monday March 27, 1995, the union faxed a letter to the president and the general manager of the employer advising the employer of the union's organization campaign. This fax was received by the employer in the afternoon of March 27. The next day the employees received a union package which had been forwarded by the union to each of them through the mail. Most of the employees of the employer received this package at their home, however, a few of them received them care of the employer's premises as the union did not have their addresses.

On Wednesday, March 29, Mr. John Murphy, the general manager of the employer, met individually with each of the employees of the employer at its Grand Falls radio station. At that time, Mr. Murphy discussed the union's organization campaign individually with each of these employees and gave raises in pay to two of the employees of that station.

On Thursday, March 30, 1995, the president and the general manager of the employer, called in the company solicitor and instructed him to hold a meeting with all the employees of the employer at its St. John's station. Two such meetings were held one after the other on that morning each of which lasted between thirty and forty-five minutes. All the employees had to attend one of the meetings. At each of these

meetings, the company president stood by one of the doors while the general manager stood by the other. The company solicitor was, for all practical purposes, the only speaker at the meetings. During each of these meetings, various topics were discussed by the company solicitor. He mentioned several times at each meeting that the intention of the meeting was not to intimidate the employees but simply to make sure that they were informed. At the first meeting none of the employees asked any questions and at the second meeting one employee asked one question.

On Friday, March 31, 1995, the union filed the first complaint herein with the Board and so advised the employer. On Monday, April 3, 1995, at the termination of the work day, namely at 5:30 p.m., the employer laid off seven of its employees at an exit meeting held at the St. John's radio station. An eighth employee, Barry Oake, was laid off at the same time at a meeting at the Grand Falls station with the employer representative there Mr. Jim Coady. At these meetings these employees were each given a letter of separation making it clear that the separations were not dismissals for cause but were due to economic reasons. A letter of recommendation was also given to each employee. Each of the employees was also offered a severance package which he would obtain provided he or she signed a release of the company.

To flesh out these bare facts, at the hearing, the employer presented the evidence of two witnesses. Its first witness, Mr. Raymond P. Whalen, the employer's solicitor, testified about having been contacted on March 27 once the employer received the union's notification and to having repeatedly advised the employer during the week of March 27 to remain strictly neutral with respect to the union's organization campaign and to ensure that they did not in any way intimidate the employees. He also testified at length to his role in the two meetings held on March 30, 1995, with respect to the several issues he had discussed during those meetings, and he provided the Board with the speaking notes which he had made and which he followed during these meetings. He could not testify with respect to the lay-offs of the eight employees other than to say that on December 29, 1994, in a telephone consultation

with Mr. John Murphy to check the appropriate notice period for an employee to be laid off shortly, Mr. Murphy had told him that ten more lay-offs were coming. Also on February 15, 1995, on the occasion when Mr. Whalen was again consulted on the phone with respect to legal problems which had arisen out of the lay-off of the above-mentioned employee on January 8, 1995, Mr. Murphy would then have told Mr. Whalen to be prepared to open a dozen files for further lay-offs. However, no names were given and no files were opened. Mr. Whalen was not consulted with respect to the lay-offs of the eight employees in question in this round.

Mr. John Murphy, the general manager of the employer, testified with respect to the operations of the employer and with respect to the downsizing plan of the employer. His evidence was to the effect that the radio operations of the employer have not made money since 1990-1991 and that as a consequence, the corporation had a definite plan of downsizing in place by the end of December 1994. He testified as to his involvement with respect to the events related above during the week of March 27, 1995 and with respect to the lay-offs on April 3, 1995.

Mr. Murphy testified with respect to his knowledge of the economic situation of the company of which he had been advised by the company accountant. Mr. Murphy has no personal knowledge of the financial statements of the company, this being a private company. He testified to the fact that there had been no general pay increases at the employer since 1991, although a profit sharing plan had been put in place for the fiscal year 1993-1994 and that a bonus totalling approximately \$130,000.00 had been paid in November 1994 as a result of this program.

Mr. Murphy also testified with respect to the change over at the VOCM FM system and of the planning which had gone therein and the meeting thereabout which was held on January 8, 1995 when the change was effectuated. He also testified with respect to the technological changes which the employer considered relative to satellite programming and digital programming. Satellite programming is now taking place

but digital programming is not yet phased in.

The employer had originally intended to call its accountant as a witness but changed its mind and decided to close its evidence with the evidence of Mr. Murphy.

The union presented five witnesses. Its first witness, Mr. Barry Oake, was a radio announcer at the employer's Grand Falls radio station. He was one of the employees laid off on April 3, 1995. He testified about his job activities and his involvement as a union representative, activist and member with NABET at the beginning of his career with another employer. He also testified to the fact that this was commonly known to everyone. He described the meeting he had with Mr. Murphy on Wednesday, March 29, 1995 and the subjects of the discussion. He stated that Mr. Murphy had compared the employment levels at VOCM as opposed to other radio employers in Newfoundland, and discussing numbers which to Mr. Oake suggested that approximately one-third of VOCM's labour force might be laid off in the event of unionization. When Mr. Oake queried Mr. Murphy as to his own potential lay-off, his having been a known union activist, he was assured by Mr. Murphy that he would have a long career in Grand Falls, that he would not get rich at it but that he would make a good living.

Mr. Oake also testified as to his lay-off exit meeting with Jim Coady in Grand Falls on Monday, April 3 and of his surprise at having been laid off after his discussion with Mr. Murphy of the previous week.

Ms. Penni Clarke, another one of the employees laid off on April 3, 1995, was a traffic manager and sales assistant for the employer. She testified about her job activities and the contents of her job. She testified about her reaction when she received the union organization campaign package and the discussions she had about it with her co-workers. She testified about the meeting held on March 30, 1995 which she attended and at which the corporation's counsel had advised the employees of the

consequences of joining a union.

Ms. Clarke also testified to having heard that it had been rumoured about her around the St. John's station during the week of March 27 that she was the president of the proposed union and that Sherry Gulliver (another of the laid off employees) was its vice-president. She testified also with respect to the exit meeting which was held on April 3, 1995 where she was laid off and as to the discussions which she had with Mr. Harris, Vice-President of VOCM Radio Newfoundland Limited, a long term friend and supporter, immediately following that meeting at which she told Mr. Harris that she was not a member of the union and to which he replied that deep down he knew that. Ms. Clarke then immediately stated that it appeared that his opinion did not matter much to which Mr. Harris replied yes.

Ms. Carolyn Strangemore, another laid off employee, was a co-host radio announcer at VOCM-FM doing the morning show. She recounted her work experience and gave her version of the staff meeting held on March 30, 1995. She testified to Mr. Whalen having stated so many times that it was not the intent to intimidate the employees that that itself became intimidating, and as to how the subjects discussed at the said meeting and the tone thereof made her believe that she had made a mistake when she had signed her union card. In her evidence, at the end of these meetings, the employees were quite discouraged about the union.

She also testified about her lay-off on April 3, 1995 and to having been absolutely stunned by it as her daily performance reviews had also been good and that it was totally unexpected.

Mr. Paul Mulrooney who was last employed at VOCM in its news department, testified about his job functions and about his version of the staff meeting which he attended. Immediately after the said staff meeting on March 30, 1995 to which he had been called from home, Mr. Mulrooney stated to his fellow workers in the news

room that he had had it, that this meeting had convinced him, and that he was going home to sign his union card and join the union. He repeated this to his news director going out in the parking lot immediately thereafter.

He also testified about the exit meeting on April 3, 1995 at which he was laid off. He mentions talking immediately thereafter to his management supervisor Mr. Phalen, the news director, who told him that he himself had just found out about the lay-off otherwise he would have advised him of it earlier.

All four of the above union witnesses testified further of having been quite surprised at having been laid off at this time, this being the middle of a rating period when it is customary that no changes whatsoever take place. They all testified that no changes were made from standard operations in this rating period other than the lay-offs in question.

Mr. Barney Dobbin, the national representative, Atlantic Provinces, CEP Media, testified about how the union organization campaign was carried out and he elaborated on the expenses related to the campaign. In view of the fact that no employees wanted to be identified as supporting the union prior to the time when a majority of such employees did support it, it was decided to do this campaign totally by mail. As some of the packages had to be mailed to the employees care of their stations as their addresses were unknown, the union knew that the employer would find out about the campaign and decided to advise the employer to try to head off any response from the employer, hence the letter of March 27, 1995. The packages sent to the employees asked them to send their cards in by March 31, again in order to minimize employer response. A certain number of employees sent in cards as a result of this campaign. The Board heard evidence of the number of cards signed in the days preceding the March 30 meeting, and of the sharp drop-off immediately following.

Mr. Dobbin stated that the cumulative effect of the meetings and the lay-offs was to stop the campaign cold. On March 31, the union made a second mailing to the employees sending them a copy of a Board's decision with respect to unfair labour practices and extending what may have been perceived as the deadline for joining. Absolutely no response was obtained to this second mailing.

That concluded the union's evidence and the employer decided not to present any rebuttal evidence.

IV

In the union's submission, the Board is dealing here with three issues. The first issue is whether the meetings held by the employer violated the Code; the second issue, whether the lay-offs violated the Code; and the third issue, if the Code was violated, what is the appropriate remedy. It is the union's position that VOCM cares not to be unionized. The union submits that but for the employer's behaviour which is in question here, the union would already be certified.

In its submission, the union reviewed all of the evidence presented before the Board to point out all the elements which in their view contradicted the employer's statement that economic reasons were the sole reasons why the lay-offs occurred, and, why the meetings were improper.

The union submits that the company violated the Code wittingly. In its view there are too many coincidences here and the Board can only conclude that there has been a violation of the Act. The union asks the Board to give the following remedy for the violations: (1) to declare that there has been an unfair labour practice; (2) to order the reinstatement of the employees laid off with all backpay and benefits lost as a result of the lay-offs; (3) to order the employer to circulate the Board's decision within five days of its issue accompanied by a letter by Mr. Butler, the president of

the company acknowledging that there has been a violation of the Code; (4) to order the employer to provide the union with the full opportunity of meeting with the employees, in the same fashion as the employer did, and to give the union full access to the employer's premises for a period of six months; (5) that the employees be given time with pay to attend one-on-one meetings with the union at a location of the union's choosing for up to one hour per employee and to order that notice of these meetings be posted on bulletin boards, again for a period of six months; (6) to order a \$50.00 a week raise be given to all employees of VOCM in order to nullify the \$50.00 a week raise given to some employees at Grand Falls; (7) to order the employer to pay to the union its lost organization costs as determined by Mr. John Vines, the Board's Regional Director in Halifax, upon his determination; (8) to order the company to pay solicitor client costs of the union with respect to the solicitor's fees in handling the present case.

The employer for its part submitted that it had in no way violated any of the provisions of the Canada Labour Code. With respect to the meetings held, the employer reviewed the evidence submitted with respect to the discussions held at the meetings and submitted that in no way could the same be held to be intimidation or as having any chilling effect on the organization campaign.

With respect to the lay-offs, it submitted that they were made pursuant to a planned downsizing which was in place since at least December 1994 and that the persons to be laid off had been identified prior to the start of the union campaign. It submitted that anti-union animus had no part whatsoever to play in the said lay-offs.

The employer asks the Board to dismiss these complaints.

V

In analysing these complaints, it is expedient to treat them separately, that is to say the one concerning the meetings and then the one concerning the lay-offs.

With respect to the complaint concerning the meetings, it is needless to repeat here the Board's abundant jurisprudence on the subject as contained in the cases referred to by the parties herein. The Board's jurisprudence on this subject is very consistent and is fairly exemplified by the decision in American Airlines Incorporated (1981), 43 di 114 (CLRB no. 301) where the Board stated:

"The employer's right to communicate with its employees must be strictly limited to the conduct of the business. The employer is only permitted to respond to unequivocal and identifiable, adversarial or libellous statements; by this we do not consider as being adversarial the fact that an employee wishes or does not wish to join a union. In the light of this background, employer's communications are to be permitted inasmuch as they are related to the efficient operation of the business. If they are not, then they must be viewed as a participation or interference in the representation of employees by a trade union and thus in contravention of Section 184(1)(a)."

(page 133)

As to the impact which this prohibition of captive audience meetings may have on the employer's freedom of expression protected by section 2(b) of the Canadian Charter of Rights and Freedom, the Board stated in Bank of Montreal (Bank and Cecil Streets Branch, Ottawa) (1985), 61 di 83 (CLRB no. 518):

"We conclude that the prohibition of captive audience meetings in response to actual or potential union organizing, as found in this Board's interpretation of section 184(1)(a) of the Code, is a reasonable limit, demonstrably justified, on employers' freedom of expression. It is therefore valid under section 1 of the Charter. ..."

(pages 114-115)

It is the much preferable course for any such meetings not to be held at all and if they are to be held then they must be held only for proper corporate purposes that is to say for purposes connected with the business or to refute union falsification.

Did the items discussed at the meetings in question in this case meet these tests? The stated purpose for holding the meetings was to dispel upset in the workplace and to advise the employees that the employer knew that the union was organizing. The individual meetings in Grand Falls discussed potential lay-offs and discussed the contents of the union's package. In the meetings in St. John's, which had no stated purpose other than to discuss the unionization drive, the notes of which were presented to the Board, many items were discussed by the employer's solicitor which were not refutation of any union falsification. Instead, the employer's solicitor discussed matters such as not being swayed by the sales pitch of one side or the other, that the solicitor did not know who the Union was and if it had local representation, advising employees to ask questions of the Union, impact on job security, etc. In our view the meetings went far beyond the neutrality required of an employer in a union organization campaign and were a calculated attempt on the part of the employer to dissuade its employees from joining the union.

With respect to the lay-offs, the onus of proof is on the employer to show that they were not made in contravention of section 94, that is to say that anti-union animus played no part in the decision to lay-off. Again, it is needless to repeat the Board's jurisprudence on violations of section 94(3)(a) (formally 184(3)(a)) of the Code other

than to give a typical example thereof. Part III of Air Atlantic Limited (1986), 68 D.L.R. (3d) 30 (CLR.B no. 600) is such:

"III

Section 184(3)(a)(i) of the Code provides:

'184. (3) No employer and no person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person in regard to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union, ...'

The law on the subject of discrimination against employees for having exercised rights under the Code is well settled. If a decision by an employer to take any of the actions described in section 184(3)(a) against an employee has been influenced in any way by the fact that the employee has or is about to exercise rights under the Code, then the employer's actions will be found to be contrary to the Code. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the Code:

'... It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1). To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.

For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is contemplated by section 184(3), he will be found to have committed an unfair labour practice.'

(Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82), pages 284-285; and 461; emphasis added)

Because the employer is usually the only person who really knows the reason for his actions, Parliament took additional steps to give section 184(3) some meaning. The Legislators saw fit to shift the burden of proof to employers when complaints alleging violations of section 184(3) are filed with the Board:

'188.(3) Where a complaint is made in writing pursuant to section 187 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 184(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.'

In the cases before us it is only the complaint going to the firing of Jacqueline Maltais that carries the onus of proof for the employer; the section 184(1)(a) complaint is not subject to section 188(3). Section 184(1)(a) provides:

'184.(1) No employer and no person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; ...'

*Although the onus is on a complainant in a section 184(1)(a) complaint, it is not necessary to establish anti-union animus for a complaint under this section to succeed. See **Canadian Imperial Bank of Commerce (North Hills and Victoria Hills Branches)** (1979), 34 di 651; [1979] 1 Can LRBR 266; and 80 CLLC 16,001 (CLRB no. 173); **Bank Canadian National** (1979), 35 di 39; and [1980] 1 Can LRBR 470 (CLRB no. 189); **Bell Canada** (1981), 42 di 298; [1981] 2 Can LRBR 148; and 81 CLLC 16,083 (CLRB no. 292); **Canadian Pacific Air Lines Limited** (1981), 45 di 204; [1982]*

1 Can LRBR 3; and 82 CLLC 16,138 (CLRBR no.334); and Bernshine Mobile Maintenance Ltd. (1984), 56 di 83;7 CLRBR (NS) 21; and 84 CLLC 16,036 (CLRBR no. 465). However, where the essence of a complaint is that an employer has conducted meetings with employees to discuss the merits of joining a union or participating in collective bargaining and the tone of the discussions are aimed at discouraging the employees from exercising their rights, it is hard to imagine what other motives an employer could have but anti-union motives."

(pages 34-36)

While the employer through its general manager gave evidence of a downsizing plan under which the said lay-offs were said to be planned for March 31, 1995, at no time did this planning ever disclose the employees who might have been selected to be laid off. The employer failed to provide any financial evidence which would support the statement made by its general manager that it was in economic difficulties and also failed to provide any concrete evidence of the planning to downsize which would show that the appropriate department heads would have been involved and have known. In fact, some of the employer's own evidence was contradictory, i.e. the profit sharing bonus given in November 1994 when the radio operations are said to be losing money. To the contrary also, the evidence of the union disclosed that some department heads had absolutely no prior knowledge of the lay-offs of the employees.

The burden of proof on an employer in cases of this nature to show that lay-offs are not done in contravention of the Code is an onerous one. It requires the employer to show by a preponderance of cogent credible evidence that anti-union animus played absolutely no part in the lay-offs. In our view the employer's evidence in this case failed to meet this onus. No financial evidence of the company was presented to support the allegation that the terminations were made for economic reasons. It presented no evidence to show that the individuals in question had been selected prior to the start of the union drive and it presented no evidence from any of its department

heads to rebut the union evidence that the said department heads had no knowledge of the lay-offs prior to their occurrence. Furthermore, in our view the people selected for lay-offs who have been shown to be known union supporters or suspected union supporters is much too coincidental to the union drive to be credible. Also the timing of these lay-offs immediately on the heels of the captive audience meetings, during a rating period when changes are normally not made at radio stations, is quite suspect. All these elements, in the Board's view provide a trail of anti-union indicia which taint these lay-offs.

VI

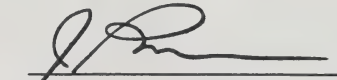
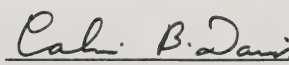
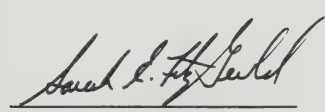
For all the above reasons, we find that the employer has violated the provisions of sections 94(1)(a), 94(3)(a)(i), and 94(3)(e) of the Code. As a remedy for the said violation, the Board:

1. declares that VOCM Radio Newfoundland Limited and VOCM News Inc. have committed an unfair labour practice;
2. orders the employer to cease and desist from interfering with the rights of employees under the Code;
3. orders the employer to reinstate the employees laid off on April 3, 1995 in the positions they previously occupied with no loss of wages and benefits within five working days of the date of this decision and to compensate the said employees for loss of earnings and benefits they would have earned from the date of lay-off to the date of reinstatement;
4. orders the employer to give a \$50.00 per week raise, retroactive to the date at which the original raise was granted, to each of its Grand Falls employees who would be within the scope of the bargaining unit claimed by the union

and who did not receive such a raise, within five working days of the date of this decision and to notify Mr. John Vines, the Board's Regional Director of its Atlantic Region of its compliance herewith;

5. orders the employer to provide the union the opportunity to hold one meeting, on company time, in two sessions if necessary to accommodate all employees, with the employees of its St. John's station to which the said employees will be directed to attend, in the same fashion as the management meetings were held, at a time of the Union's choosing within a period of six months from the date of this decision;
6. orders the employer to provide the union the opportunity to hold a similar meeting with the employees of each of its other stations to which the said employees will be directed to attend at a time of the Union's choosing within a period of six months from the date of this decision;
7. orders the employer, upon the union's request within a period of six months from the date of this decision, to effectuate one mailing of union materials supplied by the union to each of its employees at their home addresses and to forthwith thereupon provide proof of such mailing to Mr. John Vines;
8. orders the employer to pay the union's reasonable costs of transportation, meals and lodging and other out of pocket expenses with respect to items 5., 6. and 7., which items we find are necessary to remedy the employer's unfair labour practice;
9. orders the employer to remit one copy of this decision to each of its employees within five working days of the date of this decision.

The Board appoints Mr. John Vines, Regional Director of its Atlantic Region, to assist the parties in implementing the above, and retains jurisdiction to deal with respect to the above which the parties cannot resolve. The Board reserves the right to issue a formal order if one is required.


J. Philippe Morneau
Vice-Chair
Calvin B. Davis
Member
Sarah E. FitzGerald
Member

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Information

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Summary

Maritime Employers' Association, *applicant*,
and Quebec Ports Terminals Inc., *respondent*
employer.

Board File: 553-1
CCRT/CLRB Decision no. 1124
June 1st, 1995



Résumé

Association des employeurs maritimes,
requérante, et Terminaux Portuaires du
Québec Inc., *employeur intimé*.

Dossier du Conseil: 553-1
CCRT/CLRB Décision n° 1124
le 1^{er} juin 1995

These reasons deal with an application filed under section 34(7) of the Code by the Maritime Employers' Association (MEA), which is the designated employer representative for the port of Trois-Rivières/Bécancour. The Board must decide whether the MEA has, pursuant to section 34(5) of the Code, the authority to request that the employers covered by the geographical certification help bear the cost of carrying out the duties of employer representative. It must also decide whether it has jurisdiction to deal with a matter which has financial repercussions, as is the case here.

The Board grants the MEA's application. It finds that the employer representative does constitute an entity separate from the employers covered by the certification and has specific powers. An employer representative has the authority to implement all processes required to fulfill in an efficient and useful manner the obligations imposed by Part I of the Code, which, from a practical point of view, inevitably implies costs.

Les présents motifs font suite à une demande fondée sur le paragraphe 34(7) du Code présentée par l'Association des employeurs maritimes (l'AEM), qui fait fonction de représentant patronal désigné pour le port de Trois-Rivières/Bécancour. Le Conseil doit déterminer si l'AEM a, aux termes du paragraphe 34(5) du Code, le pouvoir de réclamer aux employeurs visés par l'accréditation géographique une participation financière aux coûts engendrés par l'exercice de ses fonctions de représentant patronal. Il doit aussi déterminer s'il a la compétence pour se prononcer sur une question qui comporte des incidences financières, comme c'est le cas en l'espèce.

Le Conseil fait droit à la demande de l'AEM. Il juge que le représentant patronal constitue une entité distincte des employeurs visés par l'accréditation géographique et qu'il possède des pouvoirs propres. Le représentant patronal a les pouvoirs nécessaires pour mettre en place les moyens requis pour la réalisation efficace et utile des obligations qui lui sont imposées par la Partie I du Code, ce qui, d'un point de vue réaliste, implique inévitablement des coûts.

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Based on the principles set out in Quebec Ports Terminals Inc. et al. (1994), 94 di 191 (CLRB no. 1076), the Board considers it has jurisdiction pursuant to section 34(7) of the Code to deal with the matter at issue. It finds that the employer representative's authority to demand that employers help bear the cost of carrying out the duties of employer representative is fundamental to the employer representative-employer relationship. In this case, QPT's refusal to contribute its share of the costs incurred by the MEA in its employer representative capacity hinders the functioning of the geographical certification regime found in section 34.

The Board will not substitute itself for the employer representative with respect to the administrative, operational and financial choices made to efficiently manage the labour relations regime. It considers that the economy and finality of the regime of section 34 are to give this task to a single employer representative which acts on behalf of the employers covered by the geographical certification. An employer that believes was wronged as a result of the employer representative's behaviour may file with the Board an application under section 34(6), which imposes on the representative a duty of fair representation.

Pursuant to the remedial powers conferred by section 21 of the Code, the Board orders QPT to pay to the MEA all amounts outstanding since April 1, 1993 as dues set by the MEA in its employer representative capacity.

Se fondant sur les principes énoncés dans Terminaux Portuaires du Québec Inc. et autres (1994), 94 di 191 (CCRT n° 1076), le Conseil estime qu'il a compétence en vertu du paragraphe 34(7) du Code pour trancher la question en litige. Il juge que le pouvoir du représentant patronal d'exiger des employeurs une participation financière équitable aux coûts engendrés par l'exercice de ses fonctions de représentant patronal est une question qui se situe au coeur de la relation représentative patronal-employeurs. En l'espèce, le refus de TPQ de verser à l'AEM sa quote-part des coûts engagés par l'AEM à titre de représentant patronal entrave le bon fonctionnement du régime d'accréditation géographique de l'article 34.

Le Conseil ne se substituera pas au représentant patronal dans les choix administratifs, opérationnels et financiers nécessaires à la gestion efficace du régime de rapports collectifs du travail. Il considère plutôt que l'économie et la finalité du régime de l'article 34 sont de confier cette gestion à un représentant patronal unique agissant au nom des employeurs visés par l'accréditation géographique. Un employeur individuel qui s'estime lésé dans ses droits par suite du comportement du représentant patronal peut présenter au Conseil une demande fondée sur le paragraphe 34(6), lequel impose au représentant patronal un devoir de représentation juste.

En vertu des pouvoirs réparateurs qui lui sont conférés en vertu de l'article 21 du Code, le Conseil ordonne à TPQ de payer à l'AEM toutes les sommes non payées depuis le 1^{er} avril 1993 à titre de cotisation déterminée par l'AEM en tant que représentant patronal.

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CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

LES MOTIFS DE DECISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Maritime Employers' Association,

applicant,

and

Quebec Ports Terminals Inc.,

respondent.

Board File: 553-1

CCRT/CLRB Decision no. 1124

June 1, 1995

The Board was composed of Ms. Louise Doyon, Vice-Chair, as well as Messrs. François Bastien and Robert Cadieux, Members. The Board held public hearings and the parties presented their arguments in writing.

Appearances

Mr. Gérard Rochon, accompanied by Ms. Lyne Perron and Mr. Jean Bédard, for the applicant; and

Mr. Luc Huppé, accompanied by Messrs. Jean Gaudreau and Claude Desgagnés, for the respondent.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

THE PROCEEDING

In this application, the Maritime Employers' Association (MEA) is asking the Board to decide if the MEA has the authority, as the employer representative appointed by the Board pursuant to section 34(4) of the Code, to determine and request from Quebec Ports Terminals Inc. (QPT) payment of its share of, or contribution towards,

the expenses incurred for the services the MEA provides to the employers, including QPT, covered by the geographic certification in the port of Trois-Rivières/Bécancour. The purpose of this contribution, which must be made by all these employers, is to reimburse the MEA for expenses incurred in the course of its duties as employer representative and to pay for its services. In fact, QPT refused to pay the bills received from the MEA in this regard. The MEA believes that it is the Board's responsibility, under the powers conferred by sections 34(7) and 21 of the Code, to determine this question which arises under section 34 of the Code.

Section 34 reads as follows:

"34. (1) Where employees are employed in

(a) the long-shoring industry, or

(b) such other industry in such geographic area as may be designated by regulation of the Governor in Council on the recommendation of the Board, the Board may determine that the employees of two or more employers in such an industry in such a geographic area constitute a unit appropriate for collective bargaining and may, subject to this Part, certify a trade union as the bargaining agent for the unit.

(2) No recommendation under paragraph (1)(b) shall be made by the Board unless, on inquiry, it is satisfied that the employers engaged in an industry in a particular geographic area obtain their employees from a group of employees the members of which are employed from time to time by some or all of those employers.

(3) Where the Board, pursuant to subsection (1), certifies a trade union as the bargaining agent for a bargaining unit, the Board shall, by order,

(a) require the employers of the employees in the bargaining unit

(i) to jointly choose a representative, and

(ii) to inform the Board of their choice within the time period specified by the Board; and

(b) appoint the representative so chosen as the employer representative for those employers.

(4) Where the employers fail to comply with an order made under paragraph (3)(a), the Board shall, after affording to the employers a reasonable opportunity to make representations, by order, appoint an employer representative of its own choosing.

(5) An employer representative shall be deemed to be an employer for the purposes of this Part and, by virtue of having been appointed under this section, has the power to, and shall, discharge all the duties and responsibilities of an employer under this Part on behalf of all the employers of the employees in the bargaining unit, including the power to enter into a collective agreement on behalf of those employers.

(6) In the discharge of the duties and responsibilities of an employer under this Part, an employer representative, or a person acting for such a representative, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers on whose behalf the representative acts.

(7) The Board shall determine any question that arises under this section, including any question relating to the choice or appointment of the employer representative."

(emphasis added)

II

THE CONTEXT

The Syndicat des débardeurs, Local 1375 (CUPE), was certified on June 12, 1992 as bargaining agent for a geographic bargaining unit comprising:

"all employees involved in loading and unloading ships and other related duties for all employers in the longshoring industry in the geographic region comprised of the ports of Trois-Rivières and Bécancour."

The Board subsequently ordered the employers involved to choose an employer representative pursuant to section 34(3)(a) of the Code (see Quebec Ports Terminals Inc. et al. (1992), 89 di 153; and 93 CLLC 16,035 (CLRB no. 967)). Because the employers could not agree on an employer representative, the Board appointed, on October 30, 1992, the MEA as employer representative, in accordance with the procedure specified in section 34(4) (see Quebec Ports Terminals Inc. et al. (1992), 89 di 194; and 93 CLLC 16,036 (CLRB no. 968)).

That decision was affirmed on October 28, 1994 by the Federal Court of Appeal in Quebec Ports Terminals Inc. v. Canada (Labour Relations Board), [1995] 1 F.C. 459, and the application for leave to appeal was dismissed by the Supreme Court of Canada on April 6, 1995 (Supreme Court Bulletin, April 21, 1995, page 676/95).

On being appointed employer representative of all employers in the port of Trois-Rivières/Bécancour, the MEA acquired the legal authority to enter into a collective agreement covering all employers concerned. It did enter into an agreement covering the period from December 8, 1992 to December 31, 1994. QPT challenged the MEA's authority to enter into that collective agreement on its behalf, because it had not given its prior authorization. On August 16, 1993, the Board determined that the collective agreement entered into by CUPE and the MEA bound all employees and employers in the bargaining unit, including QPT, regardless of the latter's wishes. (See Maritime Employers' Association (1993), 92 di 135; and 94 CLLC 16,027 (CLRB no. 1027). That decision was also affirmed by the Federal Court of Appeal in Quebec Ports Terminals Inc. v. Canada (Labour Relations Board), *supra*.)

Those decisions were issued under the provisions of section 34 as amended by Bill C-44, An Act to amend the Canada Labour Code, 3rd session, 34th Parliament (passed on November 29, 1991). Parliament amended section 34, first, to provide in section 34(4) for a dispute resolution mechanism relating to the choice of an employer representative following the granting of a geographic certification order and, second,

to clarify in section 34(5) the employer representative's powers and responsibilities. Parliament also conferred on the Board, pursuant to section 34(7), the power to determine any question arising under section 34. This intervention by Parliament was made necessary by the inability to resolve the ongoing labour dispute in the port of Trois-Rivières/Bécancour following QPT's refusal to authorize the MEA, then the agent of the employers, to sign a collective agreement on its behalf.

QPT then obtained a permanent injunction from the Superior Court of Quebec, prohibiting the MEA from entering into a collective agreement without its approval. On December 16, 1994, the Quebec Court of Appeal set aside that injunction (Association des employeurs maritimes c. Terminaux Portuaires du Québec Inc. et autre, no. 500-09-000275-909, December 16, 1994), and concluded as follows:

"... that after December 5, 1991, there was no longer any reason to maintain the conclusions sought by the application for a permanent injunction because the question raised was clearly within the jurisdiction of the Canada Labour Relations Board; ..."

(page 5; translation)

The application for leave to appeal to the Supreme Court of Canada was dismissed on April 27, 1995 (Supreme Court Bulletin, April 28, 1995, page 741/95).

The present dispute is to be read against a backdrop that has been marked, for several years, by various disputes between QPT and the MEA. This situation and its repercussions on the working conditions of longshoremen employed on both shores of the St. Lawrence were described in detail in Maritime Employers' Association and Terminaux Portuaires du Québec (1987), 65 di 162; and 19 CLRBR (NS) 34 (CLRBR no. 642); and Quebec Ports Terminals Inc. et al.(1967), supra.

Since the filing of this application, the Board rendered an initial decision on the meaning and scope of section 34(7) of the Code (see Quebec Ports Terminals Inc. et al. (1994), 94 di 191 (CLRB no. 1076)). That case, which also involved the MEA and QPT, concerned the respective obligations and powers of the employer representative and the employers regarding the interpretation and application of the provisions of the collective agreement, in particular those governing statutory holidays. QPT presented in that case substantially the same arguments it presented in the instant case, in particular those regarding the civil nature of the dispute and the Board's jurisdiction to deal with it under section 34(7) of the Code.

The Board decided in that instance that it had jurisdiction, under section 34(7) of the Code, to deal with the MEA's application because the application involved a labour relations matter concerning the interpretation, application and administration of the collective labour relations system in the longshoring industry. It was, as such, a question arising under section 34. The Board determined that QPT had to comply with the interpretation and application of the collective agreement adopted by the employer representative, subject to its right to file a complaint alleging a breach by the MEA of its duty of fair representation. Pursuant to the remedial powers conferred by section 21, the Board ordered QPT, among other things, to meet the requirements arising from the MEA's interpretation and application of the relevant provisions of the collective agreement.

QPT filed an application with the Federal Court of Appeal for judicial review of that decision and that application is still pending (Terminaux portuaires du Québec c. Centre de données maritimes Inc. et autres, file no. A-402-94). In the wake of QPT's refusal to comply with Board orders, the MEA asked the Board, pursuant to section 23 of the Code, to file the orders in Federal Court, which the Board did on March 21, 1995. (See Terminaux Portuaires du Québec Inc., March 21, 1995 (LD 1416). QPT also filed an application for judicial review of that decision (Terminaux portuaires du Québec Inc. c. Centre de données maritimes Inc. et autres, no. A-217-95 (F.C.A.).)

It is against this background that the Board must decide, in the instant case, if the question that arises concerning the employer representative's power to determine and request from the employers payment of the costs of geographic certification is a question which arises under section 34, and one over which the Board has jurisdiction. The question must be considered having regard to the facts of this case and the practical and specific repercussions that QPT's refusal to assume its share of the expenses has on the application of the certification system in the port of Trois-Rivières/Bécancour.

III

THE FACTS

The main facts of this case can be summarized as follows.

1. The MEA is a non-profit employer organization which has for more than 25 years represented employers in six Great Lakes and St. Lawrence ports where there is geographic certification. It has represented the employers in the port of Trois-Rivières/Bécancour since 1987. Over the years, it has established an administrative structure and developed an expertise to meet the requirements of the collective labour relations system in the longshoring industry. In the light of this situation, the Board appointed the MEA as employer representative in the port of Trois-Rivières/Bécancour on October 30, 1992 (see Quebec Ports Terminals Inc. et al. (968), supra).
2. Further to the signing of the collective agreement in December 1992, the MEA's representatives met, on January 18 and March 9, 1993, with the employers in the port of Trois-Rivières/Bécancour, including QPT, to discuss the budget estimates established for that port, and the contribution rates to be used to reimburse the MEA for expenses incurred in its capacity as employer representative. These estimates had been conveyed to the employers in December 1992.

3. On January 18, the employers, by unanimous agreement, notified the MEA of the need to try and reduce expenses. QPT's representatives, for their part, stated they preferred a contribution rate based on hours worked rather than on tonnage handled. QPT also objected to the inclusion of certain expenses in the budget, in particular those for the headquarters and the expenses characterized as "common" to the St. Lawrence ports. It also indicated that, before agreeing to share the costs of geographic certification, it wanted to settle the problems it claimed to be having concerning the administration of the collective agreement.

4. On March 9, 1993, the MEA presented to the employers, including QPT, revised budget estimates that included a reduction of expenses. These estimates, however, were not final because QPT refused to provide specific information on the tonnage it had handled.

According to the MEA, all employers present on March 9 indicated they approved the revised budget proposal. This approval was given informally, without a vote being taken. QPT, however, denied that it had approved any budget or any contribution rate whatsoever, but acknowledged the MEA's efforts to present a proposal containing reductions of expenses. QPT indicated that it would have agreed to pay the costs directly linked to the port of Trois-Rivières/Bécancour, but this would have meant replacing the MEA with an organization that would have acted solely for that port.

5. QPT's reasons for refusing to approve a budget or make a contribution to the MEA were the same as those it had given the MEA December 1992, after receiving the budget estimates, and in January 1993, after meeting with the MEA's representatives further to the January 18 meeting. These reasons can be summarized as follows.

1. The December 1992 collective agreement was entered into without QPT's approval and against its interests. QPT therefore demanded that the

agreement be amended in accordance with the instructions it had given the MEA during collective bargaining.

2. QPT would not pay any expense common to other ports or related to the MEA's headquarters. Moreover, all expenses had to be authorized by QPT and related exclusively to the promotion of the interests of geographic certification in the port of Trois-Rivières/Bécancour.

3. A written service agreement had to be entered into with the MEA, subject to the amendments sought to the collective agreement.

6. On March 10, 1993, Brian P. MacKasey, President of the MEA, informed MEA members and QPT in writing of the contribution rates MEA had determined for the port of Trois-Rivières/Bécancour and of their effective date, April 1, 1993. The contribution formula adopted for QPT was based on hours worked, as per QPT's request. The contribution formula adopted for the other employers was based on tonnage handled.

7. On March 18, 1993, Captain Claude Desgagnés, Vice-President of QPT, notified the MEA in writing that he disapproved of the budget discussed at the March 9 meeting, and he reiterated the above-mentioned reasons in support of his position.

8. On March 22, 1993, the MEA again informed QPT that the applicable contribution rate i.e. \$1.26/hour, would take effect on April 1, 1993 and that its contribution was now due. In the ensuing days, QPT informed the MEA that it was maintaining its position and refused to make the contribution.

9. The MEA billed QPT weekly and sent a formal notice, but QPT still refused to pay.

10. In the meantime, the MEA continued to provide QPT, except for a short time following the dispute that the Board settled in Quebec Ports Terminals Inc. et al. (1076), supra, with the same services as those provided to the other employers who made their contribution to the MEA.

IV

THE PARTIES' POSITIONS

1. The MEA's Position

The MEA claimed that it has the right, by reason of its appointment, to determine and request from the employers it represents payment of a contribution, as reimbursement for expenses incurred in its capacity as employer representative.

The special geographic certification system, like the ordinary certification system, is based on the fundamental principle of exclusive representation. There are two basic features to this principle: (a) the full exercise of its employer responsibilities on behalf of all employers covered by the certification, including the power to request a contribution; and (b) the duty of fair representation. The MEA's power to assess is therefore the necessary adjunct of its representation function. In this regard, the mandatory contribution of all employers with respect to the expenses incurred in their representation by the employer representative is essential to ensure the survival of the collective bargaining process and the collective labour relations system in the port of Trois-Rivières/Bécancour.

Section 34(7) confers on the Board jurisdiction over all questions relating to the implementation of the special geographic certification system, including jurisdiction to determine whether "the power" conferred by subsection (5) of section 34 includes

the power to impose an employer contribution. The Board's expertise puts it in the best position to determine this issue.

The MEA is asking the Board to intervene in order to counter the harmful effects of QPT's actions, without which the employer representative's role and the very foundations of the collective labour relations system established by section 34 would be compromised.

The MEA's application is not related to a civil matter over which the Board does not have jurisdiction, as QPT claimed. Such an application relates to labour relations, not to private law.

The applicable contribution formula and rate are matters that, according to the MEA, pertain to its internal management, and are not within the Board's jurisdiction, unless they become subject to section 34(6) which allows an employer to challenge a decision or action of the employer representative which it considers discriminatory, arbitrary or in bad faith. This is the only situation in respect of which the Board could intervene, and decide if the formula applied by the MEA in determining the rate of contribution and the amounts of which it seeks payment contravene the Code.

If, however, the Board decided to examine the method used by the MEA to determine the contribution rate, a method based on the previous year's expense, from which estimates are drawn, MEA argues that such is a recognized accounting procedure. Moreover, the MEA argued that all subjected expenses included in its budget for the port of Trois-Rivières/Bécancour relate to the expenses needed to manage the certification in that location. The MEA concluded that the percentage of costs assigned to this certification is equitable.

2. QPT's Position

An analysis of section 34 leads QPT, first, to conclude that the issues with which the Board may deal under section 34(7) must relate expressly to one of the subjects mentioned in section 34. Since the Code does not expressly impose on QPT any obligation to compensate the MEA for the services which the latter claimed to have provided to it, or give the employer representative the right to determine and request from employers payment of a contribution for such services, the application is without merit. In this regard, QPT submitted that section 34(7) of the Code does not give the Board the administrative authority to deal with the present application.

If the Board does not accept these arguments, QPT argued subsidiarily that the purely civil nature of the MEA's application, which concerns the financial relations between the employer representative and the employers, is a private property and civil law matter over which the Board has no jurisdiction. Consequently, granting such authority would be beyond the powers conferred on Parliament by section 101 of the Constitution Act, 1867 with respect to the establishment of tribunals since this provision does not authorize Parliament to constitute tribunals having jurisdiction in civil matters, this jurisdiction having been assigned to the provinces under section 92(14) of the Constitution.

Second, QPT argued that the MEA's application is without merit because the obligation to make a contribution can exist only if the MEA has a legal, contractual or statutory basis. However, the MEA and QPT do not agree on this matter, and the Code does not impose such an obligation on employers covered by a geographic certification.

The "powers" conferred on the employer representative by section 34(5) are limited to powers related to the employer's obligations under Part I in respect of unions and employees. These powers do not include the power to regulate employers and assess

them contributions. QPT used the analogy of the check-off of union dues provided for in section 70 of the Code, the Board's jurisdiction in that case being limited to dealing with requests from employees to be exempted from paying these dues because of their religious beliefs.

QPT also objected to the method of calculation used by the MEA. It argued that the Board should determine whether this method is appropriate, because the MEA cannot make this determination without being subject to any control. The Board must therefore determine how an employer representative should be compensated for the services it provides to employers. To this end, the Board should probably establish a general and universal rule that would serve as a guide to the employer representative. This rule would enable it to determine the funding necessary to discharge the representation function. The Board should also decide that this rule applies to all employer representatives in all Canadian ports governed by section 34. According to QPT, the MEA should determine the amount of the contributions with reference to actual costs, with supporting documents, and not rely on budget estimates. QPT also submitted that part of the expenses appearing in the MEA's budget are "common expenses" pertaining to the management of the St. Lawrence ports and the headquarters in addition to the port of Trois-Rivières/Bécancour. Finally, the Board should consider the quality of the services offered by the MEA for the purposes of determining the amount payable by QPT.

V

The questions the Board must determine in the instant case are the following.

1. Does the employer representative appointed under section 34(5) have the power to determine and seek from each employer covered by the geographic certification the payment of sums of money that constitute its share of the costs incurred in order to

enable the employer representative to discharge its full obligations under Part I of the Code? If so, what limits are placed on the exercise of this power?

2. Does the Board have the power, under section 34(7), to deal with any question that arises from a dispute between the employer representative and an employer, in particular having regard to the fact that the MEA's request has financial repercussions? Does this type of question come within the scope of section 34 and, if so, can the Board deal with it?

The General Context of the Employer Representative's Power

The Board has had a recent occasion to consider the elements or specific characteristics of the role of the employer representative acting under the geographic certification system (see Quebec Ports Terminals Inc. et al. (1076), supra).

In the present context, these elements remain fully valid and warrant further examination in order to identify the power of the employer representative at issue here. Moreover, the Federal Court of Appeal recently had occasion to examine the organization of the collective labour relations system in the longshoring industry, in particular the notion of employer representative, in the wake of the 1991 amendments to section 34 (see Quebec Ports Terminals Inc. v. Canada (Labour Relations Board), supra). This is why it is useful to review these elements in greater detail.

(a) The Specificity and Exceptional Nature of the Certification System in the Longshoring Industry

In the above-mentioned decision, the Board, in examining its powers under section 34(7), had the following to say regarding certain characteristics of the system established under section 34:

"An examination of the application of section 34(7), of the questions that the Board may have to determine, or of its powers under this provision, must necessarily include an examination of the general scheme and peculiarities of the labour relations system in the longshoring industry.

The geographic certification system is at the very heart of collective labour relations in the longshoring industry. Geographic certification is a major departure from traditional certification, if only because sections 34(1), (3) and (5) include within a common bargaining structure employers that also continue to compete with one another in the marketplace. To the existing employer-union structure of collective labour relations, geographic certification adds a new element: the single employer-employers structure. The former structure is conventional in terms of form and operation: collective bargaining is intended, under the provisions of the Code, to establish to some degree a balance of power between the parties. The latter structure is exceptional in that it requires the businesses that vary widely in size, get together and co-operate to define and reconcile their interests with respect to labour relations matters.

These somewhat theoretical considerations are important to the extent that they reveal, as inherent in the system of negotiating and administering collective agreements in the longshoring industry, a dynamic which, if not openly confrontational, is at the very least latently adversarial, not only between the traditional parties, i.e., the employer and the union, but also between the components of one of the parties, in this case the employer."

(Quebec Ports Terminals Inc. et al. (1076), supra, page 203)

(b) The Existence Within this Special Certification System of Latent Conflicts and the Role Assigned to the Board in Resolving Them

In that same decision, the Board noted the nature and number of disputes that may trigger the application of section 34 and the means of addressing them.

To QPT, which was also a party to that case and which claimed that the only questions with which the Board could deal under subsection (7) were those expressly defined in the other subsections, the Board replied as follows:

"... The interpretation 'rule of effectivity' leads the Board to conclude otherwise, namely, that Parliament did not add subsection (7) merely to reaffirm jurisdiction that the Board already possessed. In order to give full meaning and effect to this provision, the Board must, on the contrary, interpret subsection (7) as conferring on the Board the necessary jurisdiction to determine any other question that is not expressly defined elsewhere in section 34, but that can reasonably be expected to arise in administering this geographic certification system (see Chrysler Canada Ltd. v. Canada (Competition Tribunal), [1992] 2 S.C.R. 394, at page 410).

It is difficult to believe that Parliament, on the one hand, could have created a special labour relations system without, on the other hand, giving in the body responsible for its implementation the means to ensure that it functions properly. ...

Thus, the system provided for in section 34 gives the employer representative a decisive role. Those special institutional arrangements which constitute the core of this system could be thwarted if the Board had no power to address and eventually to deal with the questions that arise in the course of its application. Were the Board to accept QPT's argument that the matter at issue here is exclusively within the jurisdiction of the ordinary courts of law, this would mean that Parliament intended to dissociate the implementation of the system from its operation, thereby relieving the Board of any responsibility for the latter."

(pages 204-205)

The Board went on to say:

"However, one thing is perfectly clear. The actual operation of such a system can create all kinds of problems, owing in particular to the fact that it compels employers to associate and to choose a single employer to represent the whole group. ...

There are many questions that the application of such a system can raise. These difficulties include the differences of opinion, and ultimately the disputes, over the actual appointment of a representative, and those that may arise in the relations between employers and employer representative, the outcome of which will affect the application of section 34. They also include questions relating to the nature and scope of the rights and obligations of the various players, be it the role of the employer representative and the employers in interpreting and applying the collective agreement, or the rules governing the internal operation of the employer association, insofar as these rules affect collective labour relations. These questions are not only very specialized, but also directly affect the reputation, integrity and viability of the system and the effectiveness of certification orders issued under section 34. These are obviously questions that are determined on a case-by-case basis, having regard to the practical consequences they entail."

(pages 205-206; emphasis added)

The Board had established in that case the parameters for interpreting and applying section 34, just as it had done in earlier decisions in which it reiterated that the system reflects legislative choices and has specific consequences. For example, in Maritime Employers' Association (1027), supra, it held that the collective agreement signed by the employer representative without QPT's approval was valid and it described as follows one of the key elements of the system:

"Industry-wide bargaining, introduced by Parliament in 1973, particularly for the longshoring industry, speaks to the will of Parliament to achieve a degree of stability in labour relations in this industry. Parliament decided in 1991, having regard specifically to the situation in Trois-Rivières and Bécancour, that this objective could be fully met only by appointing a single 'representative', even if this went against the wishes of individual employers. ..."

(pages 149-150; and 14,220; emphasis added).

(c) The Notion and Role of the Employer Representative

In Quebec Ports Terminals Inc. v. Canada (Labour Relations Board), supra, the Federal Court of Appeal examined the notion of employer representative:

"In substituting the words 'employer representative' for the word 'agent' in the old version to designate the spokesperson for the employers at the bargaining table, Parliament was indicating that the system had been changed. Why would it have used a new term if it wished to preserve the same legal institution? Contrary to the arguments made by QPT, Parliament could not have chosen the phrase 'employer bargaining agent' without creating confusion in the language since under section 3 of the Code the phrase 'bargaining agent' already means the union. The word chosen was not the word 'representative,' which standing alone might suggest that it was used as a synonym of the word 'agent,' but instead the phrase 'employer representative.'"

(page 473; emphasis added)

In recognizing that the employer representative appointed under section 34 is not an agent, the Federal Court of Appeal confirmed Parliament's intention to consider the employer representative as an entity separate from that comprising the individual employers and one with specific powers. Its remarks confirmed in this regard the Board's decision in Quebec Ports Terminals Inc. et al. (1968), supra, which described as follows the amendments to section 34:

"Our analysis of the legislation enacted [Bill C-44] following these injunctions reveals that the replacement of the word 'agent' with the words 'employer representative,' and the clarifications made to the powers of this representative, reflect Parliament's intention to create a special system in keeping with the autonomy that characterizes collective labour relations legislation. Thus, under section 34(5), the 'employer representative' appointed is explicitly invested by the Code, and not by the employers it represents, with the power to bind all employers in the unit, including necessarily those that had not proposed it as representative. Its appointment alone empowers it to

negotiate and sign a collective agreement on behalf of the employers it represents. This is the very essence of industry-wide or geographic bargaining. The representative, however, cannot act arbitrarily."

(pages 204-205; and 14,282; emphasis added)

The employer representative therefore has not only the power but also the duty to discharge, on behalf of all employers as a whole, all the obligations of an employer under Part I and to bind them in this regard. This is why, in our opinion, Parliament created the employer representative as an entity separate from that comprising the employers and gave it the necessary powers to guarantee it the freedom of action required to implement and discharge its obligations and duties. This implies that fulfilment of these obligations cannot be dependent on each employer's individual wishes. Were this the case, it would be impossible for the employer representative to manage labour relations effectively on a day-to-day basis, in particular to administer the collective agreement, and it would continually run the risk of being penalized for failing to discharge its obligations.

The Powers of the Employer Representative

This is the context in which the "powers" entrusted to the employer representative "by virtue of having been appointed" in order to fulfil its statutory obligations must be interpreted pursuant to section 34(5). Parliament did not define or enumerate all these powers and the Board must, in the present case, ask itself whether the MEA's power to require employers to make a financial contribution in order to defray its expenses and compensate it for services rendered is a necessary power related to its employer representative duties.

The statutory obligations of the employer representative are the source of its powers and define their scope. They include the obligation to bargain in good faith with the union with a view to entering into a collective agreement, which the MEA did, and

consequently the obligation to apply the collective agreement, as any employer must do. The Code also imposes on the employer representative other obligations, in particular to employers, and failure to discharge these obligations may give rise to complaints of unfair labour practice. The employer's role thus entails a number of aspects and requires that the employer representative have the necessary means to enable it to carry out this role properly. This approach is based on the rule of interpretation regarding utility found in section 12 of the Interpretation Act, R.S.C. 1970, c. I-23. This is, moreover, the reasoning the Board followed in Quebec Ports Terminals Inc. et al. (1076), supra, on the question of the scope of the Board's powers under section 34(7).

In concrete terms, then, these necessary means are those that will enable the employer representative to discharge fully and effectively its obligations under Part I. More specifically, these means include the implementation of a structural and administrative framework that can meet the specific requirements of the system established by section 34, including the negotiation and administration of the collective agreement, the implementation of adapted management procedures and methods, the appropriate facilities, all of which require a well-trained and competent staff. In short, the exercise of the employer representative function inevitably entails the costs associated with the implementation and operation of such a system. The nature and extent of these costs will vary depending on the number, size and activities of the employers affected, the degree of complexity of the provisions of the collective agreement, the experience of the parties, the history of labour relations and any other relevant factor.

In this regard, the situation of the employer representative is no different from that of any employer which, under a single employer certification, must fulfil its obligation to negotiate a collective agreement in good faith and, once an agreement is concluded, to apply and administer it. All these activities cost time and money, and the employer must allocate the necessary funds for this purpose, just as it does in the case of its other management costs.

However, the similarity between the situation of an employer representative and that of an ordinary employer ends here. The financial resources that an employer representative requires in order to fulfil its employer obligations can come only from the employers it represents, in this case employers the MEA represents in the port of Trois-Rivières/Bécancour. It would therefore be difficult, indeed impossible, to imagine that an employer representative could properly discharge its responsibilities as an employer within the meaning of the Code without sufficient and continuing financial support from all the employers it represents.

In the instant case, QPT's refusal to pay the MEA its share of the expenses incurred, while the other employers in the geographic area in question pay their share, has the following repercussions: either the MEA requires that the other employers make up, through additional contributions, the shortfall resulting from QPT's refusal to pay, or it reduces the services that it must provide to the employers. In either case, the operation of the geographic certification system is seriously compromised, either by flagrant inequity or inadequate resources that are likely to prevent the employer representative from continuing to discharge its obligations properly.

The Board cannot imagine that, where an employer covered by geographic certification refuses to pay its share of the costs associated with geographic certification, the special collective labour relations system in the longshoring industry would not empower the employer representative to secure the financial resources it requires.

For this reason, the Board concludes that the powers that the employer representative requires in order to meet all its obligations under the Code and the requirements of operating the geographic certification system include the power to determine and request from the employers covered by the geographic certification payment of their fair share of the costs incurred on their behalf to discharge these obligations.

The Board's Jurisdiction Under Section 34(7)

This power having been recognized, before what forum must the employer representative seek redress when, as is the case here, it is denied this power?

QPT argued that the question referred to the Board falls outside the geographic certification system and the area of collective labour relations, and hence outside the Board's jurisdiction. For this reason, it submitted, the amounts that the MEA is seeking constitute a financial claim for services rendered and a civil matter strictly between the employer representative and the employer.

The approach the Board adopted in Quebec Ports Terminals Inc. et al. (1076), *supra*, in particular that QPT's contention at the time was based on an erroneous characterization of the dispute, applies in our opinion in the present case. Even though, on the surface, the MEA's claim concerns sums of money, this fact does not alter the true nature of the dispute between the parties, nor does it confine it to a purely civil matter over which the Board would lack jurisdiction pursuant to section 34(7). The real question at issue here, on the employer side, is one that impacts fundamentally on the reputation, integrity and viability of the system established by section 34. It is the day-to-day operation of the certification for the port of Trois-Rivières/Bécancour that QPT is challenging. Its refusal to share the expenses incurred in administering this system directly impedes its effective operation and threatens to paralyse the employer representative. The role of the employer representative is crucial to the integrity of the scheme of this system and inherent in this role is the power of the employer representative to secure adequate financial resources. This is, therefore, a question over which the Board has jurisdiction because it goes to the core of the system established by section 34 and because it is one that relates first and foremost to labour relations.

Although the Board's power to deal with such a question, or others that may arise under section 34, is recent and can undoubtedly be considered new law, it is unquestionably the Board's view that this power is associated with the area of law that deals with collective labour relations. The ordinary courts of law have long recognized this as a separate and distinct area of common law. They have in this regard recognized that labour tribunals, in particular arbitrators and labour relations boards, possess the necessary powers to make a final determination with respect to disputes that arise in this area, in particular the power to order remedies not unlike those that were traditionally the preserve of the ordinary courts of law. They thus rejected the argument that in ordering these remedies, such as payment of damages or reinstatement, labour tribunals were exercising a jurisdiction exclusive to the ordinary courts of law. In both cases, the latter based the validity of these remedial powers on the attainment of the specific objectives of collective labour relations legislation.

In St. Anne Nackawic Pulp and Paper Co. Ltd v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R. 704, the Supreme Court of Canada described as follows the rule of the independence of labour relations legislation:

"... The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks."

(pages 718-719)

The Court, having concluded that ordinary courts of law have no jurisdiction to consider claims arising out of rights created by a collective agreement, added that recognition of the jurisdiction of an arbitrator in this regard is in keeping with Parliament's intent. Estey J. said the following:

"... It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration, when adopted by the parties as was done here in the collective agreement, is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective agreements. ..."

(page 721)

This is the same approach that had earlier led the Supreme Court of Canada to recognize that grievance arbitrators have the power to order a union to pay the employer damages following an unlawful strike. (See Polymer Corporation v. Oil, Chemical and Atomic Workers International Union, Local 16-14 (1961), 61 CLLC 15,341 (Ont. H.C.J.), affirmed by the Supreme Court of Canada in Imbleau et al. v. Laskin et al., [1962] S.C.R. 338; and Shell Canada Ltd. v. United Oil Workers of Canada, [1980] 2 S.C.R. 181).

Moreover, the power of a labour relations board to order an employer to reinstate an employee dismissed for exercising a right conferred by the Labour Code, a power that until then had belonged to the ordinary courts of law, was also recognized. (See Labour Relations Board of Saskatchewan v. John East Iron Works Ltd., [1948] 4 D.L.R. 673 (P.C.); and United Last Company Ltd. c. Tribunal du travail et Adamowicz, [1973] R.D.T. 423 (Que. C.A.).)

The mere existence of similarities between a particular power and a power traditionally the preserve of the ordinary courts of law is therefore not sufficient reason to conclude that this particular power is not within the jurisdiction of a labour relations board. This is what the Supreme Court of Canada decided in Lucien Tremblay and others v. Commission des relations de travail du Québec et al., [1967] S.C.R. 697. It recognized in that case the power of Quebec's Commission des relations de travail to order the dissolution of an employer-dominated union, the

Commission having the power to order the necessary remedies to ensure compliance with the principles of labour relations legislation.

With regard to the analogy that QPT made with the union check-off, the Board noted that the key decisions on this subject have clearly established the principle that all employees represented by the union, whether or not they are union members, must participate financially in its administration, because all benefit from union representation. The courts thus recognized that the bargaining agent had the right to collect dues from employees long before this right was enshrined in legislation. (See Rand Formula (1991), 1 C.L.L.R. 2150, and Syndicat catholique des employés de magasins de Québec Inc. v. Compagnie Paquet Ltée, [1959] S.C.R. 206.) The Board found that this reasoning must be applied in the instant case, since it is both necessary and fair that the expenses incurred on the employers' behalf to administer the certification system be borne by all employers.

The fact that Parliament did not expressly provide that an employer representative may determine and request from employers payment of a financial contribution or that the Board may order such payment does not mean that these powers do not exist, for the reasons stated earlier. The Board therefore rejected this QPT argument.

The Constitutional Argument

Since the Board has already decided that the question before it is not limited to a simple financial claim of a civil nature, but is directly related to labour relations and thus the type of question that arises under section 34 of the Code, it found that there is no reason to comment further on QPT's constitutional argument based on its own interpretation, which in the Board's opinion is not founded.

The Merits of the Application

We now turn to the arguments advanced by QPT in support of its objection to the procedures and criteria applied by the MEA in determining the contribution.

First, the Board did not accept QPT's contention that it does not have to pay its share of the costs of geographic certification so long as the collective agreement has not been amended in accordance with its instructions and a written services agreement has not been concluded with the MEA. These arguments have essentially already been made by QPT and rejected by the Board in Quebec Ports Terminals Inc. et al. (967), supra; and Quebec Ports Terminals Inc et al. (968), supra. Applications for judicial review of these decisions have been dismissed.

Second, the Board did not accept QPT's suggestion that it should determine, using a general and universal rule, the manner in which employer representatives, including the MEA, should be compensated for the services provided to employers. In the Board's opinion, such a rule would make no allowance for the individual characteristics of employer representatives, the needs of employer and existing practices, as the case may be.

Moreover, in the Board's view, this approach is contrary to the scheme and purpose of the system established by section 34. It disregards the reasons that led Parliament, in 1991, to adopt a certification system under which a single employer representative acts on behalf of the employers and may even be appointed without their agreement. Implicit in the representative's role is the requirement that it make administrative, operational and financial decisions, and even bargaining decisions, that will enable it to manage effectively this very special collective labour relations system. This, moreover, is what the Board recognized when it decided in Quebec Ports Terminals Inc. et al. (1076), supra, that the employer representative had the power to interpret and apply the collective agreement and to bind the employers in this regard. The

Board did not then interpret the collective agreement in place of the employer representative and did not formulate a rule of interpretation that would have bound the representative in the exercise of this function. It did, however, state that in interpreting the agreement, the employer representative should meet the requirements of the duty of fair representation. This approach applies here and it is not up to the Board to determine each employer's share, or to formulate a determination rule that would bind the employer representative in this regard. The Board does not possess a general power to control and supervise the employer representative's actions in the performance of its duties, nor is it an appeal body that could make, in place of the employer representative, the decisions for which the latter is responsible. In short, the Board has no authority to substitute itself for the employer representative or assume the role of manager of the certification system.

The employer's exclusive power is counterbalanced by section 34(6) which expressly reads as follows:

"34. (6) In the discharge of the duties and responsibilities of an employer under this Part, an employer representative, or a person acting for such a representative, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers on whose behalf the representative acts."

This provision not only places limits on the way the employer representative may exercise its powers, but also defines the Board's jurisdiction with respect to the employer representative's actions in its relations with the employers. Pursuant to section 34(6), the Board may intervene if after receiving, under section 97(1)(a), a complaint alleging violation of that provision, it concludes that the employer representative breached its duty of fair representation with respect to one or more employers. The Board can then, acting pursuant to its powers under section 99 of the Code, order appropriate remedies to ensure that the employer fulfils its obligations to the employers.

QPT never filed a complaint of unfair labour practice against the MEA, seeking a declaration from the Board that the MEA had in any way breached its duty of fair representation in managing the certification system, and the appropriate remedies. QPT sought no such finding either in its written submissions or in its representations at the hearing.

If QPT believes that the MEA is breaching its duty of fair representation in carrying out its role as employer representative, it can complain to the Board which will decide whether its arguments have merit. There is reason again to refer to what the Board said in a decision cited earlier concerning the mechanisms contained in the Code for resolving disputes that may, and inevitably do, arise during implementation of the certification system established by section 34:

"In the Board's opinion, Parliament also anticipated, in more than one way, this type of situation. First, it coupled the employer representative's exclusive power with a duty of fair representation: the employer representative must not act in a discriminatory or arbitrary manner or in bad faith. Parliament also provided a recourse that the employers can exercise against their representative if they believe that it is not discharging its obligations in accordance with the requirements of the Code. This recourse is section 34(6). QPT could therefore appeal to the Board under this provision. It has not done so. Of course, it may have reasons to dispute the employer representative's actions, but the solution is not to cease unilaterally fulfilling its employer obligations under the collective agreement."

(Quebec Ports Terminals Inc. et al. (1076), supra, page 208)

For these reasons, the Board finds that the employer representative has the power to determine and request from the employers it represents payment of their fair share of the costs incurred to administer the geographic certification in the port of Trois-Rivières/Bécancour.

The Board, after examining all the arguments, evidence and submissions of the parties, allows the MEA's application filed pursuant to section 34 of the Code.

VI

REMEDIES

The Board has to decide the practical question that arises concerning QPT's refusal to pay the employer representative its share of the costs of geographic certification that the MEA is asking it to assume. To this end, the Board must define the remedies that are appropriate for resolving this problem in order to ensure that the collective labour relations system in the port of Trois-Rivières/Bécancour functions properly.

Section 21 of the Code sets out the powers necessary to settle the problems of applying the system established by section 34, other than problems resulting from a breach of the duty of fair representation, for which express provision is made in section 99(1)(a.1) of the Code.

"21. The Board shall exercise such powers and perform such duties as are conferred or imposed on it by this Part, or as may be incidental to the attainment of the objects of this Part, including, without restricting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Part, with any regulation made under this Part or with any decision made in respect of a matter before the Board."

This provision expresses Parliament's intention to give the Board the necessary powers to ensure the effective operation of the rules provided for in the Code, their purpose being to establish sound labour relations and industrial peace in federal works, undertakings or businesses. The remedial powers contained in this provision are of a general nature (see Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn., [1993] 3 S.C.R. 724), and these powers apply where the Code does not

expressly provide for any remedial power (see Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board et al., [1984] 2 S.C.R. 412; and Canadian Pacific Air Lines Ltd., *supra*). These powers must be exercised in accordance with the principle enunciated by the Supreme Court of Canada in National Bank of Canada v. Retail Clerks' International Union et al., [1984] 1 S.C.R. 269:

"... it is essential for there to be a relation between the unfair practice, its consequences and the remedy."

(page 288)

This, moreover, is what the Board stated in Canadian Imperial Bank of Commerce (1985), 60 di 19; 10 CLRBR (NS) 182; and 85 CLLC 16,021 (CLRBR no. 499):

"The remedy in each case then must be fashioned keeping in mind the need to re-establish the nature of the balance envisaged by the provisions of the Code, sound labour relations and the need not to punish but to remedy."

(pages 53; 216; and 14,153)

In the light of these principles, the Board has fashioned remedies to ensure that the employer representative appointed under section 34(5) has the necessary financial resources to discharge its obligations as an employer and thus ensure the effective operation of the certification system in the port of Trois-Rivières/Bécancour.

FOR THESE REASONS, the Board:

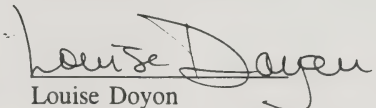
DECLARES that QPT, like all the other employers, must pay its share of the costs inherent in the services provided by the MEA in its capacity as employer representative of the employers in the port of Trois-Rivières/Bécancour;

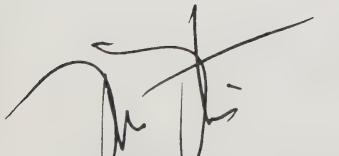
ORDERS QPT to pay all the amounts outstanding since April 1, 1993, which amounts constitute its share as determined by the MEA, in its capacity as employer representative, of the expenses inherent in the services provided by the MEA to the employers in the port of Trois-Rivières/Bécancour and to continue paying the amounts owed for this purpose as they fall due.


If, within 15 days of the date of this decision, the parties fail to agree on the implementation of the preceding remedies, the Board reserves the right to intervene at the request of either party to settle the outstanding questions arising from the implementation of this decision and to order any further remedy to resolve the present dispute.

The Board appoints Ms. Suzanne Pichette, Regional Director of the Board's office in Montréal, or any other person she may designate, to assist the parties in implementing these remedies.

This is an interim decision within the meaning of section 20(1) of the Code.


Louise Doyon
Vice-Chair


François Bastien
Member


Robert Cadieux
Member

information

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Summary

Communications, Energy and Paperworkers Union of Canada, Bruce Tisshaw and Dave Buchanan, *complainants*, and Insurance Courier Services, a Division of D & D ICS Group Inc., *respondent*.

Board File: 745-4830
CLRB/CCRT Decision no. 1125
June 19, 1995



Résumé

Syndicat canadien des communications, de l'énergie et du papier, Bruce Tisshaw and Dave Buchanan, *plaignants*, et Insurance Courier Services, une division de D & D ICS Group Inc., *intimée*.

Dossier du Conseil: 745-4830
CLRB/CCRT Décision n° 1125
le 19 juin 1995

The Board dealt with three unfair labour practice complaints alleging violations of the Canada Labour Code (Part I - Industrial Relations). Two courier drivers, one permanent and the other probationary, alleged that their terminations during the union's organizing campaign violate section 94(3)(a) of the Code. The union claims that the terminations also constitute a violation of sections 94(1)(a) and 94(3)(e) of the Code.

The Board reiterated the applicable principles and Board policy applying to terminations during a union organization drive.

The Board found that the employer violated section 94(3)(a) in terminating the permanent driver, but that it had met the burden of proof in respect of the reasons for terminating the probationary driver. The Board also concluded that the employer had violated sections 94(1)(a) and 94(3)(e).

The Board ordered the employer to cease interference with union and employee rights, and to reinstate the permanent courier driver with compensation.

Il est question ici de trois plaintes de pratique déloyale de travail alléguant violation du Code canadien du travail (Partie I - Relations du travail). Deux conducteurs-messagers, un employé permanent et un stagiaire, allèguent qu'ils ont été congédiés pendant la campagne de syndicalisation en violation de l'alinéa 94(3)a) du Code. Le syndicat prétend que les congédiements vont également à l'encontre des alinéas 94(1)a) et 94(3)e) du Code.

Le Conseil réitère les principes applicables et sa politique portant sur les licenciements au cours d'une campagne de syndicalisation.

Le Conseil juge que l'employeur a violé l'alinéa 94(3)a) en congédiant l'employé permanent, mais a pu justifier le congédiement de l'employé stagiaire. En outre, il juge que l'employeur a violé les alinéas 94(1)a) et 94(3)e).

Il ordonne à l'employeur de cesser de porter atteinte aux droits du syndicat et des employés. Il ordonne également la réintégration et le dédommagement de l'employé permanent.

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LES MOTIFS DE DECISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Communications, Energy & Paperworkers
Union of Canada, Bruce Tisshaw and Dave
Buchanan

complainants,

and

Insurance Courier Services, a Division of D &
D ICS Group Inc.,

respondent.

Board File: 745-4830

Decision no. 1125

June 19, 1995

The Board was composed of Mr. Jean L. Guilbeault, Q.C./c.r., Vice-Chair, and Members Patrick H. Shafer and Sarah E. FitzGerald. Hearings were held in Toronto on October 4, 5 and 6, 1994, November 14, 15, 16 and 17, 1994 and January 26 and 27, 1995.

Appearances

Mr. Douglas J. Wray, for the complainants Bruce Tisshaw, Dave Buchanan, and the Communications, Energy and Paperworkers Union of Canada, accompanied by Jim Counahan, national union representative.

Mr. Mark E. Geiger, and alternately the co-counsel William Anderson and Simon T.N Cridland for the employer, accompanied by Cliff St. Pierre, Director of Human Resources for the employer.

These reasons for decision were written by Sarah E. FitzGerald, Board Member.

I

The Communications, Energy and Paperworkers Union of Canada ("CEP" or the "Union") represents Bruce Tisshaw and Dave Buchanan in their complaints against Insurance Courier Services ("ICS" or the "Employer"), a division of D & D ICS Group Inc. The complaints were filed under section 94(3)a(i) of the Code. Both complainants lost their employment as courier drivers during a union organizing campaign at the Judson Avenue sorting facility in Etobicoke, Ontario. Section 94(3)(a)(i) states:

"94. (3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union..."

Tisshaw and Buchanan say they lost their employment because of their support for and participation in the union's campaign. Tisshaw, a permanent courier driver, alleges that he was the key organizer. Buchanan, a probationary driver, says that he attended a union meeting, signed a membership card and discussed the union with others from the workplace.

CEP alleges, on its own behalf, that the terminations of Tisshaw and Buchanan also interfered with the formation of a trade union, contrary to section 94(1)(a) of the Code, and are further in violation of s. 94(3)(e).

"94. (1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union;...

94.3(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

(ii) making a disclosure that the person may be required to make in a proceeding under this Part, or

(iii) making an application or filing a complaint under this Part;... "

ICS courier services are directed at two markets. The Insurance Division provides an internal mail service between insurance companies and brokers. Documents are transported coast-to-coast overnight, in both Canada and the U.S. The Health Division offers courier service in a related market. Raw materials and finished products are transported between various laboratories, and the dental, medical, and optical practitioners using laboratory services.

ICS employs approximately 1,200 people in Canada. CEP directed its organizing campaign at courier drivers working from the main sorting facility at Judson Avenue. This facility employs 270 people, of which about 105 are courier drivers.

Judson Avenue is a "hub" facility, handling all documents and materials that, when sent or received, pass through Metropolitan Toronto. Courier drivers load and deliver items that have been sorted for delivery on their routes.

Since the filing of these unfair labour practice complaints, CEP applied for certification and was certified by the Board on March 3, 1995, for the following unit of employees (file 555-3836):

"all employees of Insurance Courier Services, a Division of D & D ICS Group Inc., classified as couriers working in and out of Metropolitan Toronto, excluding broker drivers, supervisors and those above the rank of supervisor."

II

ICS maintains that the terminations of Tisshaw and Buchanan were not motivated by anti-union animus. In support of this statement, the Employer points to recent management training in matters of employee supervision, progressive discipline, and employee rights in unionization campaigns.

The training was offered following the Board's decision in a recent unfair labour practice complaint against ICS Insurance Courier Services and Lewis Couriers, Division of D & D ICS Group Inc. (1993), 91 di 90; and 18 CLRBR (2d) 286 (CLRB no. 997). The Board found in that case that ICS interfered with the formation of a union contrary to section 94(1)(a), and violated sections 94(3)(a)(i) and 94(3)(e) when it closed its Sudbury operations during an organizing drive and laid off all employees. The Board ordered ICS to reinstate the employees. Mr. Cliff St. Pierre, D & D ICS Group Inc.'s industrial relations and human resources specialist dealt with the implementation of the Board's order. The Sudbury operations were not reopened but a financial resolution of the matter was negotiated with the affected union and laid-off employees.

ICS gave the following reasons for terminating the employment of Messrs. Tisshaw and Buchanan. Dave Buchanan, a driver in the Health Division, was terminated on May 26, 1994 during his probationary period, by manager Frank Tantalo. The decision was made following 2 days of route auditing which showed that Buchanan was not using ICS manifest sheets properly. Mr. St. Pierre who is also the Director

of Human Resources for ICS, testified that if management has any doubt about a probationary driver after a second route audit in the 3-month probationary period, the Employer does not take the risk of hiring the driver permanently. Decisions about probationary drivers are normally left to Operations management, and do not involve Mr. St. Pierre.

Manifest sheets indicate which clients on a driver's route will receive a delivery that day. Drivers must compare that information with the sorted parcels left for them, to ensure they have all items before leaving Judson Avenue. Any items given to the driver at the last moment must be added to the manifest form before the driver's copy is detached.

ICS witnesses explained why a driver's failure to use the manifests properly compromises speedy parcel delivery, parcel security, the Employer's tracing operations, and client billing.

Concerning the May 26 termination of Bruce Tisshaw, also a Health Division driver, Mr. St. Pierre testified as follows. He reviewed Tisshaw's personnel file after manager Frank Tantalo telephoned to discuss concerns about Tisshaw's verbal exchange with a client on May 10. He considered Tisshaw's disciplinary record and was satisfied that the system of progressive discipline he introduced at ICS had been followed. He considered the May 10 client incident to be a culminating event warranting dismissal. Tisshaw had twice been disciplined for demonstrating a poor attitude toward the company in front of other employees. The file also showed an earlier incident involving another inappropriate verbal exchange with the same client.

Courier drivers are the company's front line employees. Good client contact is key to the Employer's success. ICS says then that Tisshaw's dismissal was justified, and that his suggestion of anti-union animus is an attempt to use the Code's protection to shield himself from his poor disciplinary record. Mr. St. Pierre says he knew nothing of Bruce Tisshaw's union activity when he made the decision to dismiss. Tisshaw had

a poor record going into the organizing campaign and an event warranting his dismissal occurred during the campaign.

III

Mr. Tisshaw testified that he had been thinking of a union campaign for several months. However, the Board is satisfied there is no connection between the Employer's discipline in February and March of 1994, and any suspected union activity.

The Board is satisfied that Mr. Tisshaw first telephoned Jim Counahan, CEP national representative, prior to starting his scheduled vacation on April 8. He took no further action himself in respect of the union, until his return to work on Tuesday, April 26.

April 26 was also the effective date of a reorganization within ICS. Responsibility for the Health Division courier drivers was transferred to a newly created position -- Health Division Manager. Frank Tantalo moved from his position as Operations Supervisor in which he reported directly to Carmen Joyce, Director of Operations. He became the new Health Division Manager, reporting to Kristi Mallinson. Ms. Mallinson is the Regional Operations Director for East/Central Ontario and Quebec. She reports to Carmen Joyce.

During the week of his return to work, Tisshaw was route audited. Route auditor Kevin McGinley accompanied Mr. Tisshaw on his morning and afternoon delivery runs on April 28. Tisshaw knew that several aspects of his performance had been checked off as "unsatisfactory".

ICS did not call Kevin McGinley as a witness, or any of the following Operations personnel in the hierarchy above Mr. Tisshaw following the April 26 reorganization: Richard Zancai, driver supervisor; Frank Tantalo, manager; Kristi Mallinson,

Regional Director of Operations or Carmen Joyce, Director of Operations. Consequently the Employer's evidence did not show what prompted the route audit, or who asked McGinley to do one, or the Employer's subsequent treatment of McGinley's report. Tisshaw's manager prior to the April 26 reorganization testified that it had been his practice to audit permanent drivers once or twice a year, and that a copy of the report was sent to the employee's personnel file.

The day of the audit, Tisshaw telephoned Jim Counahan at CEP and set up an organizing meeting for Wednesday, May 11. Counahan asked Tisshaw to bring a small number of interested drivers with him to plan a strategy for the campaign.

The day of Tisshaw's call to CEP, Mr. St. Pierre was in Quebec City with Carmen Joyce, Director of Operations. Both report directly to David Millard, President of ICS (and of the D & D ICS Group Inc.). That evening Joyce told St. Pierre that Frank Tantalo, the new Manager of the Health Division, had called to advise that a union organizing campaign was being discussed by employees and that a meeting was to be held shortly. Joyce and St. Pierre changed their travel plans and returned to Toronto the following morning, Friday, April 29. St. Pierre met with Tantalo that morning to discuss what he had heard. St. Pierre testified that he told Tantalo he did not want to know which employees were supporting the union. He maintains that at no time did he receive the names of any employees supporting the union.

At some point on April 29, Kevin McGinley submitted his report of the previous day's audit of Tisshaw. Written comments added before the report was submitted describe Tisshaw's negative attitude towards the company and an unwillingness to update route sheets as required. The comments indicate that the route sheets had been given to "Frank".

Following his discussion with Frank Tantalo, Mr. St. Pierre arranged a meeting of Judson Avenue managers and supervisors on Sunday, May 1. Legal counsel attended

and reviewed the training session on unionization previously held. Following that meeting, St. Pierre and Joyce met with President Millard, and his son Marc Millard, Executive Vice-President of ICS.

Meanwhile, Tisshaw prepared and distributed notices of the upcoming May 11 meeting to drivers. St. Pierre recalls learning of the May 11 meeting date from Carmen Joyce or Kristi Mallinson. On Friday, May 6, a letter from Carmen Joyce, Director of Operations, was mailed to all employees at their home addresses. St. Pierre, Joyce and legal counsel helped draft this letter about employee rights in a union organizing campaign.

The following week Tisshaw was involved in a confrontation with the same client he had been in trouble with before. The client left a message for his ICS sales representative. That telephone call would be returned May 12.

At the May 11 union meeting some drivers signed cards and paid the \$5.00 in front of other drivers. Jim Counahan of CEP asked for volunteers to collect further cards and monies at the workplace. He testified that Tisshaw volunteered to do so, stating aloud "Since I am the guy who contacted you, I'll do it".

Between the May 11 meeting and his dismissal on May 26, Tisshaw collected signed cards and monies, witnessed signatures on cards, and turned the cards over to CEP.

On May 12, the ICS sales representative telephoned the client to discuss the May 10 incident. It is not clear how Carmen Joyce as Director of Operations learned of the incident, but that same day, Mr. Joyce asked Frank Bolduc, the National Sales Manager, to investigate the matter and report back. Mr. Joyce asked Frank Bolduc to obtain a written statement from the client, which was unusual. The sales representative investigating a complaint usually decides whether a client letter is required. Frank Bolduc did not know Tisshaw or the client in question.

Frank Bolduc interviewed the client on May 13 and submitted a reporting memo to Carmen Joyce on May 17. Joyce asked Bolduc to keep after the client for a letter. Frank Bolduc never did speak with Tisshaw. He explained that the sales department services ICS clients and Operations deals with the drivers.

IV

During the hearing, an admission was made on the Employer's behalf. Between Thursday, May 12 and Friday, May 20, ground level management learned the names of certain employees believed to be union supporters. When subsequently, Tisshaw's former manager testified, he explained that in the week of May 15, he learned the names of five or six employees believed to be union supporters including that of Bruce Tisshaw. He was given those names by supervisors, assistant supervisors and an employee. Dave Buchanan's name was not mentioned. Mr. Grimmer passed the names along to Kristi Mallinson, Regional Operations Director, as he did with any other information he acquired about the campaign.

Mr. St. Pierre says that he received Tisshaw's personnel file on Friday, May 20 before the long weekend. Initially he testified that he had not heard of Tisshaw prior to receipt of the file and that the file came to him automatically as part of the ICS progressive discipline system which requires that he as Director of Human Resources review a permanent employee's file before any dismissal. He subsequently recalled that Frank Tantalo telephoned some day after May 10, to discuss the May 10 client incident and seek advice, and that during that telephone call Tantalo indicated he had discussed the matter with Tisshaw. Mr. St. Pierre also remembers that before he received the file, Carmen Joyce mentioned a problem between one of the drivers and a client.

Mr. Tisshaw recalls meeting with manager Frank Tantalo around May 17 along with driver supervisor Richard Zancai and two other drivers. Tantalo spoke briefly with each driver. He asked Tisshaw about the client in question, and then told Tisshaw

that ICS was having trouble accommodating this client. Tisshaw should avoid confrontation and have the client telephone ICS if there were any problems.

St. Pierre testified that he made the decision to dismiss Tisshaw on Friday, May 20, or during that long weekend. He considered the May 10 incident to be a culminating event. The only documentation in the personnel file about this matter was a copy of Frank Bolduc's May 17 reporting memo to Carmen Joyce. However, St. Pierre was satisfied on the basis of Tantalo's telephone call that the matter had been discussed with Tisshaw as required by the ICS progressive discipline system.

Mr. St. Pierre says that at the time he made the decision to dismiss, he was unaware of certain matters of May 20 concerning Tisshaw (discussed below). These matters became the subject of subsequent correspondence between supervisors and management the day Tisshaw was fired.

Tisshaw telephoned Counahan on the long weekend and set up a second union meeting for Sunday, May 29. Tisshaw prepared and photocopied meeting notices, and with three other employees, distributed them.

Following the long weekend, St. Pierre prepared and on May 25 faxed, a draft dismissal letter concerning Tisshaw, to Frank Tantalo. Before doing so he discussed the matter with both legal counsel and Kristi Mallinson. He does not remember whether Ms. Mallinson favoured dismissal.

The draft dismissal letter contains several errors. It suggests that Frank Tantalo met with Tisshaw about the May 10 client incident on the day it occurred. It confuses a history of disciplinary incidents in which Mr. Tisshaw displayed a poor attitude in front of other employees, with customer complaints. The letter suggests that various customers found Tisshaw's behaviour to be unacceptable.

On May 26, Frank Tantalo fired Mr. Tisshaw. The dismissal letter he signed contains the same text and errors as the draft letter.

Also on May 26, Frank Tantalo wrote to Kristi Mallinson to report that on Friday, May 20 Tisshaw had not made a particular delivery that Tantalo had requested. In another May 26 memo, driver supervisor Richard Zancai advised Mr. Tantalo that Tisshaw had not signed out the truck used on May 20. The Board finds the timing of this correspondence as odd as the fact that Tantalo did not discuss these matters with Mr. St. Pierre before signing the dismissal letter and firing Mr. Tisshaw. Mr. Tisshaw says that the May 20 matters were never discussed with him.

V

The evidence relating to Mr. Buchanan can be more briefly summarized. He received notice of the first May 11 union meeting from Mr. Tisshaw. He attended the meeting, signed a card and paid his money in front of other drivers. He thinks he was the only probationary driver present. He took some blank membership cards with him and discussed the union with several people from the workplace.

On May 16 and 17, a 2-month follow-up audit that is usually conducted of probationary drivers was conducted by Kevin McGinley. Mr. McGinley submitted his report on May 18. A May 20 memo from manager Frank Tantalo to Carmen Joyce, Director of Operations expresses Tantalo's concerns about hiring Mr. Buchanan as a permanent driver.

Mr. Buchanan was aware that McGinley had concerns about his use of the manifest sheets, but he was taken completely by surprise when on Thursday, May 26, he was called to a meeting and told his employment was terminated.

Dave Buchanan's evidence satisfied the Board that he does not appreciate the significance of the manifest system to ICS. Despite various explanations as to why

he did not add items to the manifest before leaving Judson Avenue, or why on occasion his parcel count was wrong, the Board concludes the audit report represents a valid basis for the Employer's concern. Mr. Buchanan made similar errors on the second day of his audit.

VI

In this complaint under section 94(3) of the Code, the burden of proof to demonstrate that there was no anti-union animus involved in deciding to terminate Tisshaw and Buchanan falls on the Employer:

98. (4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

The shifting of the burden of proof gives s. 94(3) some meaning. The Employer is usually the only person who really knows the reasons for his actions. See Air Atlantic, infra.

The evidence shows that Mr. Tisshaw has been a troublesome employee for ICS. However the Union asks the Board to conclude that even if the May 10 client incident warranted discipline, anti-union animus affected the decision to dismiss Mr. Tisshaw.

Anti-union motives need only be a proximate cause to establish violation of section 94(3). The Board's policy is well described in Air Atlantic Limited (1986), 68 di 30 (CLRB no. 600), which itself refers to a frequently cited passage from Yellowknife District Hospital Society. The Board said in Air Atlantic, supra in respect of section 184(3) [now s. 94(3)]:

"The law on the subject of discrimination against employees for having exercised rights under the Code is well settled. If a decision by an employer to take any of the actions described in section 184(3)(a) against an employee has been influenced in any way by the fact that the employee has or is about to exercise rights under the Code, then the employer's actions will be found to be contrary to the Code. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the Code:

'... It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1). To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.

For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is contemplated by section 184(3), he will be found to have committed an unfair labour practice.'

(Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82), pages 284-285; and 461; emphasis added)

The reversed burden of proof does not apply to the complaint under section 94(1)(a). Consequently the union bears the burden to establish that the Employer's conduct interfered with the formation of a trade union. Proof of an intention to interfere is not a necessary element of a section 94(1)(a) complaint.

VII

The Employer says that it has presented to the Board all members of management that had anything to do with the decisions to refuse to continue to employ Tisshaw and Buchanan. Had Frank Tantalo been called as a witness, says ICS, the only point needing clarification was the date of the meeting at which he and Tisshaw discussed the May 10 client incident. Tantalo's evidence about the subjects discussed in that meeting, or in any other meetings Tantalo's name was connected to, would simply be a question of degree, since at least one person present at each meeting had already testified.

With respect, the Board does not agree. Even if Mr. St. Pierre did not know that Tisshaw was a union organizer, either because he asked people not to give him names or because management chose not to do so, certainly Tantalo as a member of management was in a position to know of Tisshaw's involvement through the communication network about which the Board heard evidence. It does not assist the Board to suggest that the final decision-maker may not have known of Tisshaw's union activity, if decisions about the April 28 route audit and report, and the investigation and handling of the May 10 client incident, and the decision to discuss Tisshaw and refer his file to St. Pierre, and the signing of a dismissal letter containing errors have been made or done by people knowing of Tisshaw's union activities.

The Employer's decision to not call Frank Tantalo as a witness is not without significance (see Murray v. City of Saskatoon (no.2) (1951-52) 4 W.W.R. (N.S.) 234). Neither did the Board hear from Carmen Joyce or Kristi Mallinson whose names were implicated in the receipt of information about union supporters and meeting dates, the handling of the May 10 client incident, and discussions with St. Pierre about Tisshaw. Regardless, the ultimate question for the Board is whether we are satisfied that ICS has met the burden of proof to show that anti-union animus was not part of the reason for the terminations.

ICS claims that Mr. Tisshaw is using the Code's protection as a shield for his poor employment performance. The Employer suggests that Tisshaw's involvement in the campaign allowed him to later claim anti-union animus if he was terminated, and it is for this reason that he let others know of his involvement in the campaign. The Board acknowledged in Fiset v. Hélicoptères Trans-Quebec Ltée (85 CLLC 14,275):

"... an employer confronted by an employee or a group of employees who have decided to use the Code's unfair labour practice provisions as a shield against a threat of being dismissed for incompetence or unsatisfactory performance of duties may be at a loss in dealing with their aggressiveness or cunning."

The Board agrees that the timing of Mr. Tisshaw's contacts with the union is closely connected to events of discipline or poor performance. However, as CEP correctly identified, this is a case requiring that the Board draw inferences. In Air Atlantic, supra, at p. 36 of 68 di:

"Seldom is there direct evidence of anti-union animus in section 184(3) [now s. 94(3)] complaints, rarely do employers stand up and admit that their actions were motivated by an underlying desire to operate their business without the incumbrance of collective bargaining. More often than not the issues came down to credibility and the cases turn on what the Board sees as the reasonable balance of probabilities given the circumstances before it."

ICS urges the Board to conclude in the Employer's favour as it did in Kleyson Transport Ltd. (82 di 1, CLRB 817). In Kleyson, the Board accepted the employer's strong evidence that the driver failed to undergo required medical and written transport examinations as requested, plus he failed to renew the driver's contract provided to him. Even though management knew of his wife's involvement in the organizing campaign, the Board concluded the decision to not renew his contract was not tainted by anti-union animus.

Even though the evidence suggests that Mr. Tisshaw could be the author of his own misfortune, the Board concludes the Employer has not met its burden of proof. The circumstances surrounding Mr. St. Pierre's receipt and review of Tisshaw's file and the subsequent dismissal letter containing errors are not satisfactorily explained. Given that names of union supporters and meeting dates passed through management, the Board would have liked to hear from Frank Tantalo about the circumstances leading to his referral of the matter to St. Pierre, the signing of a dismissal letter containing errors, and the decision to effect the dismissal on May 26, shortly before the second union meeting scheduled for May 29. The Board concludes that the Employer has not met the burden of proof and Mr. Tisshaw's complaint under section 94(3)(a)(i) is granted.

In respect of Dave Buchanan, certainly an employee's probationary status would not excuse a dismissal tainted by anti-union animus. See Gariépy v. Executive Security Services Ltd. (1990) 81 di 159. However the Board concludes that the Employer did meet its burden of proof with respect to the reasons for termination of Mr. Buchanan. His complaint under section 94(3)(a)(i) is dismissed.

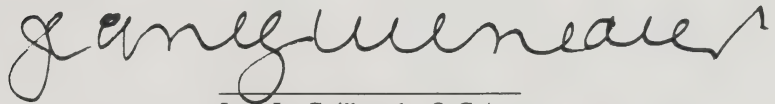
Finally, having regard to all of the evidence, the Board concludes that the fact and timing of the Employer's termination of Mr. Tisshaw violates s. 94(1)(a) and 94(3)(e) of the Code.

As remedy for these violations, the Board:

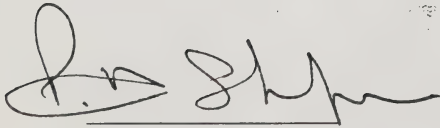
1. declares that Insurance Courier Services, a division of D & D ICS Group Inc. has committed unfair labour practices;
2. orders the employer to cease and desist from interfering with the rights of employees and the union under the Code;

3. orders the employer to reinstate Bruce Tisshaw in the position he previously occupied with no loss of wages and benefits, within five days of the date of this decision, and to compensate him for loss of earnings and benefits he would have earned from the date of the dismissal to the date of reinstatement, with interest;

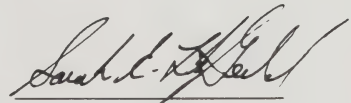
The Board appoints Ms. Carol Garrow, investigating officer at the Board's Regional Office in Toronto, to assist the parties in implementing the above, and retains jurisdiction to deal with any matters in this regard that the parties cannot resolve. The Board reserves the right to issue a formal order if one is required.



Jean L. Guilbeault, Q.C./c.r.
Vice-Chair



Patrick H. Shafer
Member



Sarah E. FitzGerald
Member

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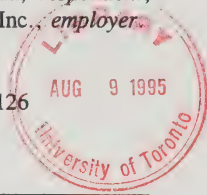
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Summary

Nicholas Mikedis, *complainant*, Seafarers' International Union of Canada, *respondent*, and Canada Steamship Lines Inc., *employer*.

Board File: 745-4698
CLRB/CCRT Decision no. 1126
June 29, 1995



Résumé

Nicholas Mikedis, *plaignant*, Syndicat international des marins canadiens, *intimé*, et Canada Steamship Lines Inc., *employeur*.

Dossier du Conseil: 745-4698
CLRB/CCRT Décision n° 1126
le 29 juin 1995

In this case, the Board deals with a complaint that a union violated the duty of fair representation set out in section 37 of the Code. The complainant says that the union's investigation of his dismissal was so inadequate that it constitutes gross negligence. The union concluded his dismissal grievance would not succeed and negotiated a deal that kept his name off a multi-employer blacklist in return for dropping the grievance against his employer. The complainant says that the inadequacy of the investigation tainted the entire process, and that in the result, the union acted in an arbitrary manner within the meaning of section 37.

The Board finds that the union's investigation was seriously negligent. The deal was negotiated without a thorough study of the grievance. Statements and opinions of employer representatives were accepted without verification. In these circumstances, the basis for negotiating the deal and its subsequent approval by the union's grievance committee are tainted. The union has acted in an arbitrary manner.

Dans la présente affaire, il est question d'une plainte alléguant que le syndicat a manqué au devoir de représentation juste prévu par l'article 37 du Code. Le plaignant affirme que l'enquête menée par le syndicat concernant son congédiement était inadéquate au point de constituer de la négligence grave. Le syndicat a conclu que le grief ne pouvait avoir gain de cause et a négocié une entente selon laquelle le nom du plaignant ne figurerait pas sur la liste noire établie par de nombreux employeurs si celui-ci retirait son grief contre l'employeur. Le plaignant affirme que le caractère inadéquat de l'enquête a vicié l'ensemble du processus et que, par conséquent, le syndicat a agi de façon arbitraire en violation de l'article 37.

Le Conseil juge que le syndicat a fait preuve de négligence grave lors de l'enquête. L'entente a été négociée sans que le syndicat effectue un examen approfondi du grief. Les déclarations et versions des représentants de l'employeur ont été acceptées sans vérification. Dans les circonstances, le fondement de l'entente et l'approbation par le comité de réclamations du syndicat sont viciés. Le syndicat a agi de façon arbitraire.

The Board ordered arbitration of the grievance and allowed the complainant to choose independent counsel for that purpose.

Le Conseil ordonne que le grief soit renvoyé à l'arbitrage et autorise le plaignant à choisir un avocat pour le représenter à cette fin.

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Reasons for decision

Nicholas Mikedis,

complainant,

and

Seafarers' International Union of Canada,

respondent,

and

Canada Steamship Lines Inc.,

employer.

Board File: 745-4698

CLRB/CCRT Decision no. 1126

June 29, 1995

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Members François Bastien and Sarah E. FitzGerald. A hearing was held on January 9, 10 and 11, 1995, at Montréal.

Appearances

Ms. Tetiana M. Gerych, for the complainant Mr. Nicholas Mikedis.

Mr. J. Brian Riordan, accompanied by Mr. Michel Desjardins, for the respondent union, Seafarers' International Union of Canada.

Mr. F. Pacetti and alternately Mr. Casper M. Bloom, for the employer, Canada Steamship Lines Inc.

These reasons for decision were written by Ms. Sarah E. FitzGerald, Member.

The complainant Nicholas Mikedis disputes the manner in which his union dealt with his dismissal grievance. Mr. Mikedis is a member of the Seafarers' International Union of Canada ("SIU"). He says that the SIU's decision to drop the dismissal grievance amounts to a violation of section 37 of the Canada Labour Code (Part I - Industrial Relations).

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

Mr. Mikedis complains specifically that the SIU's investigation of his dismissal was so inadequate that it constitutes gross negligence. The investigation led SIU to conclude it would not succeed with the grievance and, based on that conclusion, SIU negotiated a deal. The deal required that SIU drop the grievance. Mr. Mikedis claims that the inadequacy of the investigation tainted the entire process and that SIU in the result acted in an arbitrary manner within the meaning of section 37. He asks that the Board order arbitration of his grievance.

I

Canada Steamship Lines Inc. ("Canada Steamship" or the "Employer") dismissed Mr. Mikedis in September 1993 from employment as an electrician aboard the S.S. Halifax. Mr. Mikedis had worked approximately 12 years for Canada Steamship, although not continuously. The dismissal letter cites a recent safety violation and a history of repeated disciplinary offenses. It also states that Mr. Mikedis will not be accepted for future dispatch to any of the Employer's ships.

The dismissal was prompted by a September 1993 Notice of Misconduct issued to Mr. Mikedis by the Chief Engineer of the S.S. Halifax. The notice describes a safety violation in which Mr. Mikedis removed what is known as a Lockout-Tagout (LOTO) device from a breaker panel. He did not wait for the second engineer who had "locked out" the power supply to remove the padlock from the LOTO. The notice also states that Mr. Mikedis has five prior warnings on record.

Mr. Mikedis was notified of his dismissal while the S.S. Halifax was at sea. Shortly afterward a physical altercation occurred involving Mr. Mikedis and the Chief and second engineers. A few hours later Mr. Mikedis was taken off the ship by pilot boat at Les Escoumins.

Douglas McLaren, then Executive V.P. of the national union, was the SIU officer who dealt with the Mikedis situation. The evidence demonstrates the following stages of investigation and decision-making. Mr. McLaren discussed the matter with the Employer and then interviewed Mikedis. He asked an SIU business representative to conduct an on-board investigation. Following that investigation, he discussed the matter with the Employer and proposed the deal to which the Employer eventually agreed. The SIU's Grievance Committee then considered the deal and decided to approve it. The deal kept Mr. Mikedis' name off an employee blacklist used by the various shipping company members of the Canadian Lake Carriers' Association (the "CLCA"). In return the grievance was dropped.

II

We make the following findings about SIU's handling of the dismissal grievance. McLaren discussed Mikedis' case twice with Gerald Carter, the Employer's labour relations director, before Mikedis arrived at SIU's offices. Carter told McLaren that the LOTO incident which led to the dismissal had endangered safety aboard the ship. The Disciplinary Code lists gross negligence endangering crew member safety and refusals to comply with safety rules as offenses warranting dismissal.

McLaren had been with SIU for 17 years; the last five as Executive V.P. He did not know what a LOTO device was at the time of these discussions with Carter or when he subsequently interviewed Mikedis. In the interview, Mikedis admitted to removing the LOTO device and consequently McLaren did not dwell on the matter even though Mikedis provided a written statement explaining the circumstances of its removal. In McLaren's opinion, Mikedis did not appreciate the seriousness of the safety violation and simply believed that a personality conflict had caused the Chief Engineer to issue the Notice of Misconduct.

Most of the interview was directed to the on-board physical altercations. McLaren was concerned that Mikedis would be added to the CLCA blacklist for fighting. This would, in addition to Canada Steamship, have denied him employment with Algoma Central Marine, the only other CLCA shipping company still employing the services of on-board electricians. Based on Mikedis' version of the fight, McLaren concluded

that the Chief Cook might be able to give a witness statement that would assist Mikedis.

Mikedis told McLaren he had received prior Notices of Misconduct but also that he had filed some grievances, even though he "had no paper on them". McLaren concluded from this that Mikedis had probably not filed grievances, but that in any event there was some sort of a disciplinary record.

Following the interview, McLaren dispatched patrolman Michel Paquette, an experienced SIU business representative, to do an on-board investigation. He asked Paquette to investigate the safety violation and the fight incident, and to interview in particular the Chief Cook. He advised Paquette that Mikedis had admitted to removing the LOTO device.

Paquette had seen a form of lockout device before. He concluded there was nothing to investigate about the LOTO incident, given that Mikedis admitted to removing the LOTO device. During his on-board investigation, he learned from the Chief and second engineers that Mikedis was not authorized to remove the LOTO device and that the second engineer should have been the one to do it. The Chief Engineer told Paquette that Mikedis knew he was not authorized to remove LOTO devices, and also that it was a serious offence to tamper with them.

Although Paquette knew Mikedis had been dismissed, he did not know that Mikedis had a disciplinary record. He did not question the Chief Engineer about prior discipline, or ask to see the ship's copy of the record.

Paquette interviewed the Chief and second engineers, and the Chief Cook about the physical altercation. He reported the results of his investigation verbally to McLaren on the same day. McLaren then spoke with the Chief Cook. At that point he decided to file the grievance against the Notice of Misconduct for removing a LOTO device, and the subsequent dismissal. He filed it with the CLCA as that association represents the shipping companies in the grievance procedure.

McLaren called Carter to advise that he was filing a grievance, and to further discuss the matter. Despite the Chief Cook's statement, Carter did not agree that Mikedis should not be blacklisted. Mr. Carter is Canada Steamship's representative on the CLCA Board that determines who will be listed on the blacklist. A listing can be grieved by the union.

Nor would Carter accept that Mikedis could be unfamiliar with LOTO procedures and thus guilty of the lesser offence of non-compliance with safety standards. Carter advised McLaren, "... we have been told that he had been told not to do this and so his action seems quite wilful". Carter also revealed that a crew member had been killed in an explosion earlier in the year aboard the S.S. Halifax. The matter did not

involve Mr. Mikedis but Carter advised that, as a consequence, Canada Steamship was particularly concerned about safety matters aboard that ship.

At the close of that conversation, McLaren proposed a deal whereby SIU would drop the grievance if Mikedis was not added to the blacklist. Carter said he would at least consider it.

Shortly thereafter, McLaren reviewed the copy of various disciplinary notices that Carter had sent to him. In his discussion of the notices with Carter, McLaren questioned the vague wording of one notice. He also remembers, although Mr. Carter does not, that he questioned the validity of an unsigned notice dated June 2, 1992. Mr. McLaren says that with or without the June 2, 1992 notice, he had been satisfied that the Employer could rely on a prior record of two warnings and a suspension to support the decision to dismiss.

Mr. McLaren did not realize that if the unsigned June 2, 1992 notice was invalid, two 1990 warnings and a suspension would no longer be part of the record. Applying a term of the collective agreement, discipline is removed from the record if a period of more than two years passes without further incident. Nor does Mr. McLaren recall realizing that one 1990 warning indicates on its face that it was not sent to the Employer because the matter was resolved.

Perhaps significant is a computerized employee report generated by Canada Steamship the day it prepared the dismissal letter. It identifies one 1990 warning, one 1990 suspension and nothing further until the September 1993 Notice of Misconduct concerning the LOTO device.

III

Mr. Mikedis tried to discuss the circumstances of his dismissal with Mr. McLaren on a number of occasions, without success. Mr. McLaren believed that he had all the information he needed, that SIU was doing all it could, and that Mr. Mikedis should wait until SIU had an answer from the Employer.

McLaren obtained Carter's agreement to the proposed deal in mid-November 1993. McLaren was a member of the SIU's Grievance Committee. He explained his recommendation of the deal to the other two members of the Committee. The Committee voted to approve the deal and did not seek a legal opinion as they usually do in dismissal cases.

SIU states that neither cost or impact on union membership were factors in the decision to drop the grievance. SIU says that it properly investigated the dismissal grievance and the fight. The LOTO incident was a serious safety violation. Mr. Mikedis did not seem to appreciate that but admitted to removing the LOTO device. Safety matters aboard the S.S. Halifax were of particular concern to Canada Steamship. Further, Mr. Mikedis was dismissed because of the safety violation and

a history of discipline. Based on all of this, McLaren concluded the dismissal grievance would not succeed. It would be better to strike a deal to at least keep Mikedis off the blacklist. He used the Chief Cook's statement to convince the Employer that for the time and money required to determine responsibility for the physical altercation, it would be better if the Employer agreed to not blacklist Mikedis if SIU in return dropped the grievance.

When McLaren proposed the deal, he did not know how much call there was for electricians on ships belonging to Algoma Central Marine.

IV

In Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509, the Supreme Court of Canada confirmed that union have the discretion to decide which grievances to take to arbitration. The Court said:

"3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

In André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319), a frequently cited decision of this Board, it was acknowledged that even in dismissal cases, a union is not expected to defend in all circumstances and to the bitter end a grievance filed by a member of the union or bargaining unit. This is especially true when it is evident that the grievance is without merit. However, a conclusion that the grievance is without merit requires a thorough study and consideration of the circumstances giving rise to it.

We conclude that SIU did not properly investigate the dismissal grievance. Mr. McLaren was strongly influenced by his discussions with Gerald Carter even before meeting Mikedis. Carter had advised that Mikedis was responsible for the fight and that the LOTO incident endangered safety aboard the ship. Mr. McLaren was ready to accept without further inquiry that removal of a LOTO device, regardless of circumstances, warranted the dismissal. When Mikedis, a long-term employee, admitted to removing the LOTO device, McLaren shifted to a course of conduct best described as "damage control". McLaren pursued a deal that would at least address what he believed would be the consequences of the physical altercation.

To the extent Paquette or McLaren subsequently inquired about or discussed the LOTO incident once Mikedis had admitted to removing it, the inquiries were fleeting in nature and made only of Employer representatives. Statements and opinions of Employer representatives were accepted without verification. The responses simply

confirmed Mr. McLaren's opinion that as a long-term employee, Mikedis should have known his business.

In the result, a serious inquiry was never made into the circumstances of the LOTO incident and the Chief Engineer's handling of it. Even though SIU worked hard to negotiate a deal it considered to be "a win", it did so without having thoroughly studied and considered the safety violation and the disciplinary record.

The inadequacy of this investigation taints the subsequent decision of the Grievance Committee. Having regard to the serious nature of the grievance and SIU's experience, the union's failure to make a proper inquiry amounts to serious negligence. We find that SIU has acted in an arbitrary manner and the section 37 complaint is granted.

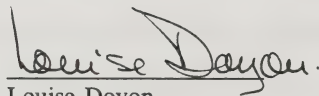
The Board orders pursuant to section 99(1)(b) of the Code, that:

1. SIU proceed to arbitration with the grievance in question forthwith.
2. Any time limits under the collective agreement which might be a bar to the arbitration be hereby waived.

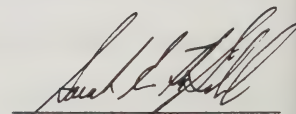
3. The complainant Mr. Mikedis be entitled to choose independent counsel for purposes of the arbitration. SIU is directed to pay all reasonable legal fees and expenses for such representation and to co-operate with counsel in providing any required assistance.

4. In the event Mr. Mikedis succeeds at arbitration, SIU shall be responsible for any compensation awarded for the period between the date of the dismissal and the date of this decision.

5. The Board retains jurisdiction with respect to implementation of this order.


Louise Doyon
Vice-Chair


François Bastien
Member


Sarah E. FitzGerald
Member

information

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Summary

James H. Rousseau, *complainant*, International Brotherhood of Locomotive Engineers, *respondent*, and Canadian National Railway Company, *employer*.

Board File: 745-4730
CLRB/CCRT Decision no. 1127
June 29, 1995

The complainant alleged that the Brotherhood of Locomotive Engineers violated section 37 of the Canada Labour Code (Part I - Industrial Relations).

According to the complaint, the union grieved the complainant's discharge and referred the matter to arbitration through Canadian Railway Office of Arbitration, a system of expedited arbitration for the railway industry. It sought legal opinion and used legal counsel to handle the matter at arbitration. The matter was heard by an arbitrator who issued an award and upheld the discharge.

This complaint alleges arbitrariness and capriciousness, cursoriness and perfunctoriness, not discrimination or bad faith. There was no evidence that the union officer responsible for handling the complainant's grievance had taken time during the investigation or the grievance procedure to review or examine the facts contained in the documents prepared by the complainant and those surrounding the complainant's dismissal. The union relied on the employer's documentation, facts and submissions, and did

Résumé

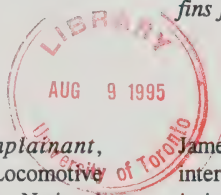
James H. Rousseau, *plaignant*, Fraternité internationale des ingénieurs de locomotives, *intimée*, et Compagnie des chemins de fer nationaux du Canada, *employeur*.

Dossier du Conseil: 745-4730
CLRB/CCRT Décision n° 1127
le 29 juin 1995

Le plaignant allègue que la Fraternité internationale des ingénieurs de locomotives a violé l'article 37 du Code canadien du travail (Partie I - Relations du travail).

D'après la plainte, le syndicat a déposé un grief concernant le congédiement du plaignant, grief qu'il a renvoyé à l'arbitrage devant le bureau d'arbitrage des chemins de fer, un régime d'arbitrage accéléré visant le secteur ferroviaire. Le syndicat a obtenu une opinion juridique et retenu les services d'un avocat pour s'occuper de l'affaire à l'arbitrage. L'affaire a été entendue par un arbitre qui a rendu sa décision et confirmé le congédiement.

La présente plainte allègue que le syndicat a agi de façon arbitraire, irréfléchie, superficielle et sommaire, et non de façon discriminatoire ou de mauvaise foi. Il n'a pas été établi que le dirigeant syndical chargé de s'occuper du grief avait pris le temps au cours de l'enquête ou de la procédure de règlement des griefs pour passer en revue ou examiner les faits contenus dans les documents fournis par le plaignant et les faits entourant le congédiement du plaignant. Le syndicat s'est fié aux documents, faits et observations



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not attempt to verify those facts.

In addition, the union representative who played such a crucial role in the complainant's grievance and section 37 complaint failed to testify. The union called and relied on its legal counsel to be a witness on its behalf. Counsel was not in a position to know what the union did or did not do.

The union's actions were merely superficial and perfunctory. The union gave the appearance of fulfilling its section 37 duty by referring the dismissal grievance to arbitration, hiring a lawyer, giving the lawyer all the documents in its possession, and accompanying the grievor to the arbitration preparation meeting and hearing.

Notwithstanding the fact that the union obtained a legal opinion and legal assistance, the "exclusive power" still belongs to the union. The duty of fair representation always belongs to and remains with the union. The duty does not shift to its lawyer or to any other agent. Nor does the use of a lawyer serve as an absolute defence with regard to a section 37 complaint.

présentés par l'employeur, et n'a pas tenté d'en vérifier l'exactitude.

En outre, le représentant syndical qui avait joué un rôle si important en ce qui a trait au grief du plaignant et à la plainte fondée sur l'article 37 n'a pas témoigné. Le syndicat a demandé au conseiller juridique de témoigner en son nom. Cette personne n'était pas en mesure de savoir ce que le syndicat avait fait ou pas fait.

Les démarches entreprises par le syndicat sont avérées superficielles et sommaires. Le syndicat a donné l'impression d'avoir rempli le devoir qui lui incombait aux termes de l'article 37 en renvoyant le grief à l'arbitrage en retenant les services d'un avocat, en remettant à l'avocat tous les documents en sa possession et en accompagnant le plaignant à la réunion préalable à l'arbitrage ainsi qu'à l'audience d'arbitrage.

Même si le syndicat a obtenu une opinion juridique et les services d'un avocat, il reste que le «pouvoir exclusif» appartient au syndicat. Le devoir de représentation justifié incombe toujours au syndicat. Ce devoir ne se transfère pas au conseiller juridique ou à tout autre représentant. Par ailleurs, le fait de retenir les services d'un avocat ne constitue pas une justification absolue en ce qui a trait à une plainte fondée sur l'article 37.

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ON QUICKLAW.

LES MOTIFS DE DECISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Rearbitration cannot be ordered by the Board because of the final and binding status given to arbitral awards under the Code. Nor is judicial review a mandatory dispute resolution mechanism contemplated by the Code. The jurisprudence is unsettled with regard to the question of whether a union has a duty of fair representation relating to the actions it takes, or neglects to take, following an arbitral award.

Having considered the circumstances of this complaint, the Board found that the union violated section 37 of the Code and that the union's duty of fair representation continued after the arbitral award was issued. Since the Board was not able to order the union to take action or to institute proceedings that would remedy the situation, it ordered the union to pay damages to compensate the complainant.

Le Conseil ne peut pas ordonner qu'une affaire soit renvoyée de nouveau à l'arbitrage en raison du caractère définitif et exécutoire que le Code donne aux sentences arbitrales. Par ailleurs, le Code ne prévoit pas la révision judiciaire comme mécanisme obligatoire de règlement des conflits. Il n'existe pas de jurisprudence établie portant sur la question de savoir si le syndicat a toujours un devoir de représentation juste quant aux démarches qu'il prend, ou qu'il ne prend pas, après qu'une sentence arbitrale a été rendue.

Après examen des circonstances de la présente affaire, le Conseil juge que le syndicat a violé l'article 37 du Code et que le devoir de représentation juste existe toujours une fois qu'une sentence arbitrale a été rendue. Étant donné que le Conseil ne peut ordonner au syndicat d'agir ou d'engager une procédure en vue de remédier à la situation, il ordonne au syndicat de dédommager le plaignant.

Reasons for decision

James H. Rousseau,

complainant,

and

International Brotherhood of Locomotive
Engineers,

respondent,

and

Canadian National Railway Company,

employer.

Board File: 745-4730
CLRB/CCRT Decision no. 1127
June 29, 1995

The Board was composed of Mr. Jean L. Guilbeault, Q.C./c.r., Vice-Chair, and Ms. Mary Rozenberg and Mr. Patrick Shafer, Members. A hearing was held in Toronto on October 25, 1994, and January 16 and 17, 1995.

Appearances

Mr. Cyril J. Abbass, for Mr. James Rousseau;

Messrs. James Shields and Phillip G. Hunt, assisted by Mr. Cliff Hamilton, for the Brotherhood of Locomotive Engineers; and

Mr. Kenneth Peel, assisted by Mr. A.E. Heft, for the Canadian National Railway Company.

The Board has before it a complaint filed by James H. Rousseau on February 9, 1994 against the Brotherhood of Locomotive Engineers (BLE) alleging violation of section 37 of the Canada Labour Code (Part I - Industrial Relations). Mr. Rousseau alleges

that the BLE denied him fair representation when submitting his grievance to the Canadian Railway Office of Arbitration (CROA). He claims that, given his 24 years of service with the Canadian National Railway Company (CN), which was clear of any disciplinary penalty, and the severity of the penalty imposed by CN, the union, by way of its counsel, had acted in a discriminatory and arbitrary manner.

Mr. James Rousseau began his employment with CN at the age of 16 in 1969 on a part-time basis during the summers when he worked at various locations as section head, engine watchman and car checker. CN hired him on permanent staff in 1972 as trainman/yardman. He qualified as locomotive engineer on November 11, 1975. Between 1980 and 1988, he was assigned at various locations to supervisory positions such as trainmaster, master mechanic, transportation officer. He became assistant superintendent at Hornepayne on April 1, 1988. He elected to revert back to the bargaining unit as a locomotive engineer on October 5, 1992, primarily for health reasons. His 24 years of service at CN ended when he was discharged in June 1993. During his years of service, Mr. Rousseau had an unblemished disciplinary record.

The BLE grieved Mr. Rousseau's discharge pursuant to the applicable BLE collective agreement and referred the matter to the CROA. The matter was heard in Montreal on Wednesday, November 10, 1993 by an arbitrator. The arbitrator in an award issued on November 12, 1993 found that Mr. Rousseau's actions constituted a grave breach of trust and deserved the most serious of disciplinary responses, which justified CN's decision to terminate his employment. The arbitrator upheld the discharge and accordingly dismissed the grievance.

The complainant contends that he specifically requested the BLE, in its submissions to the arbitrator, to include a request to mitigate the penalty of discharge imposed by

CN, on the basis of the severity of the penalty and his unblemished service record. He also contends that he voiced this request to counsel for the union. Furthermore, he submits that the union and its counsel acted in a capricious manner, and failed to consider his requests made prior to the arbitration hearing and to file his submissions with the arbitrator for consideration.

The Board had before it a preliminary matter raised by the complainant's counsel. According to Mr. Rousseau's counsel, the union did not respond to the section 37 allegation during the investigation conducted by the Board's labour relations officer, nor did it file representations until the middle of June 1994, after the officer completed his investigation and then only in response to the officer's specific request for the file. In these representations, the union states that although at no time did it act in a wilful and arbitrary manner in representing Mr. Rousseau at arbitration, it conceivably did hinder the outcome of Mr. Rousseau's arbitration case. This, submits Mr. Rousseau's counsel, is an admission of a breach on the part of the union. The arbitration hearing proceeded while a criminal investigation was ongoing and before the Board's investigation was completed. Therefore, the union did not have sufficient evidence to present its case to the arbitrator. Although the union did not intend to represent Mr. Rousseau improperly, according to the complainant's counsel, the union did in fact not properly represent Mr. Rousseau before the arbitrator.

Counsel for the union submits that it was he who represented Mr. Rousseau at the arbitration hearing. The grievance was arbitrated through the expedited process rather than the formal process at the complainant's request. If anything, Mr. Rousseau's grievance went to arbitration too early; however, this is not a test under section 37 of the Code. The union's June 15, 1994 response is not, nor has been, a concession that the union violated section 37.

On the preliminary matter, the Board decided that simple admission on the part of the union of violating section 37 is not sufficient to substantiate a section 37 violation. The Board must exercise its jurisdiction to hear evidence. It directed the parties not to concentrate on evidence that was presented to the arbitrator at arbitration or to the court in the criminal proceedings.

During the hearing, the issue of the extent of counsel for the employer's role in these proceedings arose.

Counsel for the employer submits that because the employer has a legal interest, it is entitled to be present and to participate fully in these section 37 proceedings. Moreover, counsel for the employer in these proceedings had represented the employer at the complainant's arbitration hearing.

Counsel for the complainant submits that the thrust of the union's case at arbitration was made through counsel for the employer.

Kenneth Peel, company counsel in this case, represented CN at the complainant's arbitration hearing. James Shields, union counsel, and Cliff Hamilton, union representative, represented the union and the grievor at the arbitration hearing; they also represented the union in this section 37 complaint against the union and the union counsel. These two persons also advised the complainant in this section 37 complaint until sometime just before October 17, 1994. The complainant then retained independent counsel to represent his interests. On October 17, 1994, Mr. Rousseau advised the Board that he authorized Mr. Cyril Abbass, solicitor, to act on his behalf before the Board (Exhibit 11).

On the first hearing day on October 25, 1994, after the complainant was examined-in-chief by his own lawyer, counsel for the union indicated to the Board that he wished to cross-examine the complainant and that afterwards, he might give oral evidence to contradict the complainant's testimony. The Board, of course, did not allow this request. It further denied the union's counsel the privilege to act as counsel for the respondent union in this section 37 case when he officially declared that he would testify as a witness.

Counsel for the complainant immediately requested an order to exclude witnesses from the hearing room. The Board granted the exclusion order.

The Board requested the parties to identify their advisors. Company counsel identified Mr. Heft as its advisor. Counsel for the complainant identified the complainant as his advisor. The union general chairman declared himself to be advisor to the lawyer yet to be appointed by the union.

As the respondent union was no longer represented by a lawyer, the Board adjourned until another hearing could be scheduled.

The Board advised the parties on November 18, 1994 that the hearing would resume on January 16, 17 and 18, 1995. At this hearing, the union was represented by another counsel from the same law firm as counsel which had been denied privilege to continue to represent the union.

This replacement counsel for the union attempted to declare the previous counsel his advisor. The Board denied this request. Upon reviewing its notes indicating that the union general chairman declared himself advisor to the new counsel, and considering its previous ruling of denying that counsel the privilege of representing the union

because of his conflict of interest, as well as counsel for the complainant's request for exclusion of witnesses, the Board ruled that the union general chairman was in fact advisor to the new counsel.

This complaint consists of three series of events: those leading to Mr. Rousseau's discharge; those leading to Mr. Rousseau's arbitration; and those following the arbitration hearing. Several people figure prominently in this case, as disclosed by the evidence, and identifying these persons would help understand the events. Mr. Phillip Malloy is a trainmaster or manager train service employed by CN at Hornepayne. Messrs. Robert Walton and Rex Beatty are conductors who are also employed at Hornepayne.

(1) Events Giving Rise to Mr. Rousseau's Dismissal

On March 22, 1993, a box car was used to complete a 200-mile round trip between Longlac and Hornepayne in order to transport 86 sheets of waferweld board at a reduced rate. These arrangements were made by trainmaster Malloy through a business contact for conductor Walton.

On March 29, 1993, the Hornepayne day yard engine, crew, three cars and caboose were utilized for three hours to ship some building materials and fuel to a drop-off point near mileage 20, which was close to Mr. Walton's fly-in-camp. Additional arrangements including having off-duty employees and several non-employees ride the train to help unload materials were made by conductor Walton through trainmaster Malloy. Mr. Malloy also accompanied the yard engine and participated in the drop-off activities.

These incidents caused the CN police to charge Messrs. Malloy and Walton and investigate them and their knowledge and roles. Mr. Beatty was also charged and investigated by the CN police concerning his responsibility and handling of the box car containing building materials on March 22, 1993.

Prior to leaving on a scheduled run on March 29, 1993, a special agent with the CN police questioned trainmaster Malloy regarding his plans for that day. The trainmaster told the special agent that he intended to take the yard crew and engine to mileage 20.9 to check mud conditions as that area had been the site of a recent derailment.

Criminal charges were laid against Messrs. Malloy, Walton and Beatty on March 29, 1993. No charges were laid against Mr. Rousseau.

The CN police approached Mr. Rousseau on April 17, 1993 and requested that he provide them with a statement concerning his recollections and policy. Mr. Rousseau went to the police office to give a statement (Exhibit U-4). When asked if using CN rail cars for personal use was a normal practice while he was the assistant superintendent in Hornepayne, Mr. Rousseau replied that he had no direct knowledge of anyone involved in the type of activity described by the investigating CN police constable. When asked to recall incidents or circumstances during the time Mr. Malloy worked for him, in which he gave, in effect, a free freight order to Mr. Walton, Mr. Rousseau replied that he had no knowledge of this. At the conclusion of the interview, the investigating agent advised Mr. Rousseau not to release a copy of his statement to anyone including the company. Mr. Rousseau was not given a written copy of this statement until the day before his meeting with a company representative.

During this investigation it came to light that in previous years one car in a train normally westward bound was used to transport material to mileage 20.0. The train

would stop to allow the material to be thrown off beside the track. This car would then simply proceed empty to the westward destination with the train.

The company did not produce any records indicating that any car was used or paid for prior to 1991, except in 1989 when a Mr. Dennis Walton, conductor Walton's father paid for the transportation to mileage 20.0. The CN special agent's investigation could not substantiate if a car was actually used in any year other than in 1989 and 1993.

The 1993 incident can be distinguished from previous incidents and characterized as more serious. The arrangements were more elaborate than those of 1990, 1991 and 1992. In 1993, Mr. Malloy made arrangements to use a special train in order to haul personal goods, and utilized off-duty employees. On previous occasions, no special train was arranged and on-duty employees would have unloaded personal goods at his camp.

After criminal charges were laid by the CN police office, the company conducted interviews and took statements from Messrs. Malloy, Walton and Beatty in a hotel (the Hallmark) in Hornepayne. Mr. Rousseau's interview was conducted in the assistant superintendent's office.

In accordance with the provisions of the BLE collective agreement, a BLE member, along with a union representative, must be given the opportunity to attend an employee investigation when there is even a remote possibility that a statement or meeting will have a bearing upon that BLE member's employment. The BLE member must be given sufficient notice to allow for time to make appropriate work arrangements, if necessary, and also to contact his union representative. The BLE member and the union representative must also be given a copy of statements and any other relied upon document or evidence.

Mr. Malloy's statement was taken on April 23, 1993. Mr. Rousseau was not notified that an interview was taking place, nor was he given an opportunity to respond to allegations contained in Mr. Malloy's statement.

On May 6, 1993 at 1320 hours, Mr. Thomas, a company representative, interviewed by telephone Ms. Wanda Whent, a retired clerk who had worked in the Hornepayne CN office. A written report of this interview was provided to Mr. Rousseau. This copy was neither signed nor initialled by Ms. Whent. Neither Mr. Rousseau nor his union representative were notified or given the opportunity to be present during this interview. Contrary to the representations of the company, the format of the report indicates an interrogative (question and answer) type interview not a narrative (story) type interview. The report indicates that Ms. Whent was questioned by the company representative about events that allegedly transpired three years earlier. This report was submitted at the arbitration hearing concerning Mr. Rousseau's discharge for the arbitrator's consideration.

The taking of Mr. Walton's statement began on May 7, 1993 at 1300 hours. Mr. Beatty was present at this meeting as Mr. Walton's union (United Transportation Union - UTU) representative. Mr. Polley, a company representative, telephoned Mr. Rousseau to advise him of this meeting at about 1220 on that day, some 40 minutes before the meeting started. Upon arrival at the hotel, the company representative requested that Mr. Rousseau wait outside the meeting room until called upon. Mr. Rousseau waited outside until approximately 1920 hours. In attendance were a stenographer, the company representative, the CN police special agent, the employee's union representative and Mr. Walton. At the end of the day, Mr. Rousseau requested a copy of Mr. Walton's statement and all documents to which he had referred. The company representative advised Mr. Rousseau that this information would be provided to the local union chairman in accordance with the provisions of the collective agreement and that Mr. Rousseau could obtain a copy from him. Mr. Rousseau contacted Mr. Woehl, his local union chairman, and

explained the situation to him. This union representative contacted the company representative and requested a copy of the employee's statement and all documents mentioned during the interview. The company representative denied this request for the following reasons: the employee statement had not been completed; the representative did not have the authority to release the employee statement; and the statement could not be released because of possible legal ramifications. The taking of Mr. Walton's statement continued on Monday, May 10, 1993 at 1800 hours. Mr. Rousseau was advised of this continuation at 1630 hours on May 10, 1993. Mr. Rousseau declined to attend this session in view of the fact he had previously been excluded from the room and because he had been assured of receiving a copy of Mr. Walton's statement.

On May 7, 1993, Mr. Rousseau telephoned Mr. R. Woehl, local union chairman representative, and asked that he place a request to obtain copies of Mr. Walton's formal statement in accordance with article 71.6 of the 1.1 Agreement as the employer told Mr. Rousseau that the information would only be provided to the local union chairman. Mr. Woehl telephoned Mr. Polley, employer representative, and requested a copy of Mr. Walton's statement. The employer representative stated that it might be inappropriate at that point in time because the statement was not complete but assured Mr. Woehl that when Mr. Walton's investigation was completed, the request for a copy of the statement would be honoured. Mr. Woehl also requested the statements of Messrs. Malloy and Beatty and was advised that the request would be honoured when the investigations were completed.

On May 19, 1993, the company representative took Mr. Beatty's statement. Mr. Rousseau was advised of this meeting at 0800 hours on the 19th (he came off duty at 0425 earlier that morning). In attendance at the interview were Mr. Rousseau, a stenographer, the company representative, the employee's union (UTU) representative and Mr. Beatty.

Mr. Rousseau's local union representative was not given a copy of any of the employee statements or other documents mentioned.

Mr. Polley, the company representative, telephoned Mr. Rousseau on Friday, May 21, 1993 and requested that Mr. Rousseau "report for a statement" on Saturday, May 22, 1993, at 1400 hours. Mr. Rousseau said that he was scheduled for duty on Saturday and asked if he should book off. The company representative told him no and requested that he report at 1300 hours on Sunday, May 23, 1993. On Saturday, May 22, 1993, the company representative asked the complainant to come to the office before reporting for duty. Mr. Rousseau was given a copy of some statements taken by CN from Messrs. Malloy and Walton, but not a written notice to appear (for his statement). He then reported for duty and worked from 1400 hours on May 22, 1993 to 0305 hours on May 23, 1993 on the Foleyet-Hornepayne run. On May 23, 1993, Mr. Rousseau reported for the arranged appointment. The taking of the statement took place in Mr. Rousseau's office. At this time, he was given a written notice to appear, outlining the charges against him, along with the remaining statements and documents (11 in total, including the information obtained by the CN police from Mr. Rousseau during their investigation) which were entered as evidence against him. He was not given the opportunity to read and respond to the statements before this interview. He was denied his right under the collective agreement to be present with his accredited union representative. The evidence indicates that on day three Mr. Rousseau was accompanied by a fellow employee (who was also an engineer and his fiancée) who was present for the duration of the interview which was conducted over a six-day period and ended at 1630 hours on Friday, May 28, 1993. (It is unclear if this individual was there in the capacity of union representative.) Upon the completion of the taking of Mr. Rousseau's statement, the company representative okayed Mr. Rousseau's return to duty. Mr. Rousseau reported for duty at 1700 hours on the 28th.

On May 29, 1993, at 0900 hours, the company representative telephoned Mr. Rousseau to advise him that he was being removed from service immediately for "safety reasons."

On June 17, 1993, another company representative, assistant superintendent Capreol, telephoned Mr. Rousseau and requested that he report to the CN office at 1015 hours on Saturday, June 19, 1993. Mr. Rousseau reported as requested, accompanied by the fellow employee who was present at the taking of his statement. He was handed a dismissal notice (Exhibit A-3) by the company representative who had conducted the previous interview. Mr. Rousseau had been held out of service without pay for 22 days.

Mr. Rousseau's written notice of termination of employment from CN and the reasons therefor read as follows:

"You are hereby discharged from the Company's service for your responsibility in connection with providing or arranging for the use of CN property along with rail transportation, switching and other additional services and facilities without charge resulting in lost revenues and additional costs to the Company during 1990, 1991 and 1992 which included the improper handling and transport of dangerous goods; withholding or providing misleading information during internal Company investigation into the above noted use of transportation services."

(Exhibit A-3)

(2) Events Giving Rise to Mr. Rousseau's Arbitration

Upon learning of his discharge, Mr. Rousseau contacted the union general chairman, Mr. Hamilton. According to Mr. Rousseau, Mr. Hamilton already knew of his discharge because the company had contacted Mr. Hamilton three days earlier. The union did not advise Mr. Rousseau of its knowledge that he would be discharged.

According to Mr. Rousseau, Mr. Hamilton told Mr. Rousseau that he would help and requested that Mr. Rousseau put together all relevant material and send everything to him. Mr. Rousseau prepared three separate documents outlining all matters he thought were important and useful for the union in its preparation of his arbitration (points for step three grievance (Exhibit A-2); summary of evidence presented as listed on page two of Mr. Rousseau's statement (Exhibit U-1); career history and information regarding events leading to dismissal (Exhibit U-2)). Mr. Rousseau sent these documents to the union general chairman on July 12, 1993 with a covering letter (Exhibit A-1).

In a letter dated July 11, 1993, union representative Woehl provided the union general chairman with some information regarding the handling of various employees during CN's investigation of the March 29, 1993 incident. Mr. Woehl also advised the union general chairman of his two requests for copies of the statements from Messrs. Walton, Malloy and Beatty and of the employer's position concerning his requests. After the second request, the employer took the position that it would not give the local union chairman copies of the employee statements because they must remain confidential for an ongoing criminal investigation and the information was crucial to the company's and the police's investigation. The local union chairman expressed his concern to the union general chairman regarding the withholding of information. The local union chairman stated that rights under the collective agreement had been violated and believed that Mr. Rousseau and another locomotive engineer would not receive a fair and impartial hearing.

As of July 12, 1993, Mr. Rousseau had not had the opportunity to meet with the union general chairman to discuss the details of his discharge.

In preparation for the arbitration hearing regarding his dismissal, Mr. Rousseau met with the union general chairman and the union's counsel in the counsel's office in Ottawa on a Friday afternoon about two to three weeks before the arbitration hearing.

This meeting was arranged by the union general chairman to prepare for the arbitration of two grievances which were scheduled to be heard the same day: Mr. Rousseau's dismissal and another grievance. Each grievor met separately with counsel, with the union general chairman in attendance. The other grievor was interviewed first. This interview lasted between half an hour to 45 minutes. While this individual met with the union's counsel, Mr. Rousseau was in the outer office reviewing a draft of the brief prepared by counsel and an associate. This particular meeting lasted about an hour in total.

CN requested that the arbitrator issue summonses to Messrs. Walton and Malloy to compel them to act as witnesses on behalf of CN. They were excluded from the hearing at all material times. Neither of these individuals were called as witnesses at the hearing into Mr. Rousseau's discharge. Mr. Beatty did not attend the arbitration hearing (Exhibit 6-A, pages 4 and 5).

Mr. Rousseau's arbitration hearing took place on Wednesday, November 10, 1993, in Montreal. The arbitrator indicated in the award he issued on Friday, November 12, 1993 that in arriving at his decision, he had relied on a joint statement of issue, statements from trainmaster Malloy and conductor Walton, a statement by Ms. Whent, the submissions from counsel for the union (Exhibit U3), the submissions from counsel for the employer, and the penalties imposed on trainmaster Malloy, conductor Walton and conductor Beatty (Exhibit 1-C).

The arbitrator concluded that on the balance of probabilities, the evidence established that Mr. Rousseau, in his capacity of assistant superintendent at Horpayne, knowingly authorized, condoned the fraudulent use of railway equipment; specifically that he arranged for the transportation of goods, some of which are classified as dangerous, to mile 20 near a tourist camp operated by conductor Walton; and that this arrangement initiated in 1990 continued through 1991, 1992 and culminated in the discovery of the scheme in 1993, after the complainant had resumed work as

locomotive engineer. Because the goods were moved without proper documentation and billing, resulting in lost freight revenues to CN in an amount in excess of \$2,000, and in breach of regulations concerning the movement of dangerous goods, and because Mr. Rousseau held the highest management position in Hornepayne, he had failed gravely in his responsibilities to ensure the observance of all company rules and procedures. By abusing his position of authority which resulted in a grave breach of trust, Mr. Rousseau deserved the most serious of disciplinary actions. The arbitrator also stated that Mr. Rousseau's discharge was consistent with the treatment accorded to Mr. Malloy and must be deemed appropriate in the circumstances. For the foregoing reasons, the arbitrator dismissed Mr. Rousseau's grievance, upholding CN's decision (Exhibit 1-C).

(3) Events Following the Arbitral Award

On November 26, 1993, counsel who was retained by the UTU to represent conductors Beatty and Walton regarding criminal charges initiated by a CN police constable in the name of the company, and levied against them in their personal capacities, wrote to the arbitrator (Exhibit 6-A) who dealt with Mr. Rousseau's grievance. Counsel expressed his concern that the arbitrator may have been unaware of or misinformed about certain facts in connection with certain circumstances described in the award, or he may have misinterpreted these facts. The charges involved events that occurred on separate days, at different locations of CN's railway transport system and under different circumstances. This letter also indicated that trainmaster Malloy, represented by other counsel, filed a complaint under section 240 of Part III of the Canada Labour Code and was awaiting the Minister's decision as to whether or not an adjudicator would be appointed to hear his dismissal case. UTU's counsel requested that the arbitrator amend his decision regarding comments pertaining to Messrs. Beatty, Walton and Malloy as they had not allowed the arbitrator to make comments concerning their cases during the course of Mr. Rousseau's arbitration and accordingly delete those portions in the award.

Alternatively, counsel requested that the arbitrator include an addendum, indicating that any references to individuals other than Mr. Rousseau, and the conclusions suggested therein, must not be given any weight in any other cases because the arbitrator would not have the opportunity to hear either evidence or representation on behalf of those other individuals.

On December 7, 1993, counsel for CN wrote to the arbitrator in response to counsel for the UTU's letter (Exhibit 7-A). Counsel took the opportunity to reiterate that the Crown was prosecuting on the basis of information and instructions provided by the CN constable and not of any instruction, direction or request of CN's management; and that the criminal proceedings mentioned were not initiated on behalf of a division of the company within the sense of any active intervention, direction or control of CN's management. In essence, this letter stated that CN would not object to the arbitrator varying the decision so as to refer to the criminal charges simply by reference to Messrs. Walton and Malloy and to omit reference to Mr. Beatty; and that CN did not support the proposition that the reference to Mr. Malloy's discharge and the reasons therefor be omitted from the reasons for decision.

On February 11, 1994, the arbitrator issued a supplementary award in Mr. Rousseau's arbitration. In this award, he stated that he had to determine whether the discharge of Mr. Rousseau was discriminatory, having regard to the discipline assessed against other individuals, and that any reference to the discipline imposed on those individuals was made for the purpose of dealing with the parties' submissions concerning the fairness of the penalty assessed against Mr. Rousseau. Anything said for the limited purposes of Mr. Rousseau's case was entirely without prejudice to the merits of any grievance which may be referred to arbitration by any of those individuals. The arbitrator retained jurisdiction in the event of any further dispute or misunderstanding between the parties concerning this matter (Exhibit 7-B).

On March 17, 1994, counsel for CN wrote to the Crown attorney, stating that criminal proceedings were not initiated on behalf of a division of the company or by management, and were not subject to any active intervention, direction or control of CN's management, and that CN wished to make clear that it was not seeking to tender or impose any particular view in the matter (the prosecution of three-named employees) and wished to leave the matter of advancing or suspending the proceedings to the Crown attorney's discretion.

On June 15, 1994, the union general chairman wrote to the Board's labour relations officer, stating that at no time did the union act in a wilful or arbitrary manner in representing Mr. Rousseau at arbitration. He also stated that he now realized that the union conceivably hindered the outcome of Mr. Rousseau's case. He further stated that the union was impeded from the beginning of this case as all evidence was not available for the union's perusal because of criminal charges laid against other employees, and was to remain confidential. Furthermore, a key witness, Ms. Whent, had since said that the statement of May 6, 1993 was inaccurate. Considering the arbitrator's reliance on the statement and the state of available evidence, the union general chairman requested that the matter be resubmitted to arbitration or hearing.

On June 30, 1994, counsel for CN wrote to the Board's labour relations officer and enclosed the joint statement of November 10, 1984, the arbitration award issued November 12, 1993, his December 7, 1993 letter to the arbitrator, and the arbitrator's supplementary award dated February 11, 1994. Counsel indicated that the union had filed no (timely) application for judicial review or, in Quebec, no writ of evocation and, in any event, there was no basis for any such application. Additionally, the complainant, the union and the union's counsel had the opportunity to call evidence (particularly that of Ms. Whent) if there was any issue concerning the accuracy of the May 6, 1993 statement. Counsel wrote that the BLE had attempted to leave an improper inference. The onus at arbitration was on the employer. The matter at arbitration was determined on the basis of the employer's evidence which was fully

disclosed to Mr. Rousseau. No issue as to the failure to make full answer and defence, and no issue that there had not been full disclosure of the record relied upon by the employer in the discharge arbitration proceedings, was raised. The BLE, its counsel and Mr. Rousseau could at all times have called the employer's evidence they deemed appropriate to call into question or otherwise challenge. The evidentiary matters were wholly within the control of the BLE, its counsel and Mr. Rousseau. Mr. Rousseau was present and had the opportunity to speak up, or to insist upon his evidence. Counsel for the employer reiterated that there was good precedent establishing the right of counsel for the BLE to conduct the case as best advised and that the Board should not take action to have the matter reopened before the CROA.

Ms. Wanda Whent wrote to the Board's labour relations officer on September 26, 1994 during the investigation of Mr. Rousseau's section 37 complaint. Excerpts from this letter read as follows:

"The unfortunate circumstances of his (Mr. Rousseau's) discharge seem to be the result of some bad advice he received, (from the arresting officer) and as I read Arbitration Case No. 2415 it looks like my statement was the most damaging to him. The paragraph I refer [sic] to in this arbitration case reads as follows:

'The statement of Mr. Walton is confirmed by the statement of Ms. Wanda Whent who worked in the outer office at the time. As Mr. Walton left his encounter with Mr. Rousseau he had a smile on his face which caused Ms. Whent to inquire as to why. Mr. Walton replied "I went to see about payment for the car, and the boss said I don't have to pay. This is my lucky day." I never asked Rob why he was smiling and he never mentioned anything to me about not paying for a car, he just uttered these words 'Hmm he doesn't want my money' as he was passing by my desk. My statement was taken over the telephone on 06 May 1993 Mr. Walton's statement was taken after that.

When Mr. Malloy advised me on April 19th that he was being held out of service and why, it was then that I told him I recalled Rob Walton coming out of Mr. Rousseau's office saying 'hmm he doesn't want my money'. this was said in conversation with Mr. Malloy and

when he went to Toronto to give his statement to the Company he included our conversation in his statement, with my knowledge, this was on April 23rd before Mr. Rousseau was accused. I feel that my hearsay evidence should not have been used or considered as evidence of anyone's discharge.

Mr. Rousseau had good raport [sic] with most of the employees, he always took time to listen to them and help out when he could. Many times I witnessed his lending them money so they could go to work or for other reasons, he would also pick up items for some of them when he would go out of town and they would come in to the office to pay him.

...

... Just before he was able to ... [revert back into the ranks as an Engineer] and while he was still holding position of Assistant Superintendent he was warned by someone that he had better watch himself as the proverbial 'THEY' were watching him and were out to get him...

...

With all this mess behind us Mr. Rousseau is the only person not working and it is my heartfelt opinion that he has paid his debt and should be allowed to return to work. ..."

(Exhibit 9)

On October 11, 1994, James Shields advised the Board that he was counsel for the BLE in this matter.

On October 17, 1994, the complainant advised the Board that he had retained counsel to represent him in this matter, and his counsel, Cyril Abbass, advised the Board that he was representing the complainant (Exhibit 11).

CN suspended Mr. Walton, and discharged Mr. Malloy; however, it did not discipline Mr. Beatty.

Messrs. Beatty and Walton are members of the UTU, while Mr. Malloy who was a supervisor at the time was not a union member. Mr. Malloy's discharge was subsequently revoked by CN after Mr. Malloy pursued his discharge under section 240 of Part III of the Code. Since being reinstated, Mr. Malloy is a member of the UTU.

The above-mentioned charges were eventually withdrawn. Mr. Rousseau found out that the charges had been withdrawn from Mr. Beatty who showed him a letter written by CN to the Crown. Mr. Rousseau's name had been raised in CN's statement but not in the police's statement.

Counsel told the Board at the hearing that Mr. Malloy has been reinstated. After Mr. Malloy was reinstated, counsel indicated that the union general chairman had discussed the matter with the company. The union had not brought this information nor Wanda Whent's written statement to the attention of the arbitrator who upheld Mr. Rousseau's complaint.

In addition to the documents filed, the complainant and counsel for the union gave viva voce evidence. That evidence varied on some crucial points as noted herein. However, counsel did not contradict the sequence of events set out in the complainant's documentary evidence.

Rousseau's Testimony

Mr. Rousseau told the Board that he knew of a practice whereby, because of the isolation of Hornepayne and the difficulty of accessibility, CN employees and their friends used CN equipment to deliver canoes or supplies to hunting camps.

He did not know how Mr. Walton had paid and arranged for the service; however, this had not been done through him. He did not know Mr. Walton was shipping anything and he had never given permission regarding a free freight order for Mr. Walton. According to Mr. Rousseau, employees had been shipping personal goods on train cars going past their camps for a very long time, even before his time. It was part of the railway culture in that relatively inaccessible area, and everyone knew about it, including company officials and the public. Mr. Rousseau never shipped anything free or arranged for anything to be shipped free or authorized the practice. Although he knew about the use of cars, Mr. Rousseau had not provided the cars in 1990, 1991 nor in 1992. These were discussed with union's counsel in Ottawa at the arbitration preparation meeting. If Mr. Rousseau was guilty of anything it was of ignoring the practice. He chose not to get involved in Mr. Walton's use of train cars. No one minded until the CN police got involved and charged Messrs. Walton and Malloy. The main difference in this case was the commandeering of an entire train.

It was only after returning to the bargaining unit as locomotive engineer that Mr. Rousseau became aware of the specifics of some of the arrangements for transporting personal property. For example, Mr. Rousseau had only learned of arrangements made by Mr. Malloy, a former subordinate of his, to transport some supplies ten miles for a friend, ten months after his return to the unit.

Mr. Rousseau requested information from CN regarding the alleged misdeeds for which he was subsequently discharged. CN responded that it was unable to give him

any information because of the CN police's ongoing investigation. Moreover, on the advice of the investigating special agent, Mr. Rousseau did not give the company the information it had requested. Instead, he gave information to the CN police who were conducting an investigation.

The complainant did not recall seeing any of the documents he had prepared and forwarded to the union general chairman in the counsel's office during the arbitration preparation meeting. He recalled that counsel had a copy of a draft brief for submission at arbitration. The complainant was given a copy of this brief after he requested a copy. He reviewed the brief and read it aloud line by line with counsel and the union general chairman, requesting a number of changes and additions.

Mr. Rousseau was concerned that counsel had not read his documents because the brief contained no specific reference to his long service with CN nor to his clean service record. There was no mention of the past practice that was condoned until the three individuals (Messrs. Malloy, Walton and Beatty) were charged in 1993. He wanted the brief to include a statement indicating that he had not been involved in the 1993 incident. The complainant brought these matters to the attention of his counsel and requested they be added to the brief. According to the complainant, counsel was abrupt with him and replied that he was not there to rewrite the brief or to make major changes. The union general chairman did not say anything in the presence of counsel. However, when counsel left the room to get his secretary to make changes to the brief, the complainant said that the union general chairman had agreed with him and had put his hands up stating "what can I do, he's the lawyer." According to the complainant, only minor changes, such as grammar, spelling, typing errors and wrong numbers, were made.

According to Mr. Rousseau, he told counsel that he had never authorized Mr. Malloy or Mr. Walton to ship any materials to Mr. Walton's camp. He had never given permission for a free freight order. Nor did he have any first-hand knowledge of this.

Mr. Walton had made arrangements through Mr. Malloy, not through Mr. Rousseau. Nor did Mr. Rousseau know that Mr. Walton was shipping anything. What he said was that for many years before his time, employees had been doing this. If he was guilty of anything, it was of ignoring the practice.

There were no discussions with Mr. Rousseau nor questions regarding the allegations contained in Exhibit A-3 raised by either the union general chairman or by counsel. (In cross-examination, Mr. Rousseau stated that his discharge notice was discussed with counsel's office.) Mr. Rousseau was not asked if he had arranged for the cars in 1990, 1991 or in 1992. Nor was he given the opportunity to explain the allegations contained in Exhibit A-3. There were no discussions concerning the possibility of admission of wrong-doing on Mr. Rousseau's part to lessen the penalty of discharge. Nor were there any discussions about delaying the arbitration hearing until after the outcome of the criminal proceedings was known. No one mentioned that Mr. Rousseau was disciplined for an incident that occurred while he was not a member of the BLE bargaining unit. Mr. Rousseau was in the management ranks and therefore did not belong to the BLE or to any other union.

Mr. Rousseau left the meeting feeling very upset. He was accompanied by the union general chairman with a copy of the revised brief. He drove the union general chairman from Ottawa back to Scarborough. During this drive they discussed the arbitration preparation meeting. If he was to get back to counsel, between the time following the arbitration preparation meeting and the arbitration hearing, it escaped him. Mr. Rousseau believed that counsel would be in touch with him before the arbitration hearing if necessary. Although he does not deny making a phone call to counsel on the Monday following the Friday meeting, he cannot recall any other contacts with the union's counsel or the union general chairman prior to the arbitration hearing date. Nor does he remember counsel contacting him after the preparation hearing or the general chairman contacting him after the drive following the

preparation meeting. According to Mr. Rousseau, counsel was quite clear that he was not prepared to rewrite the brief and counsel was not an easy man to approach.

The complainant is of the opinion that the arbitration brief did not give enough weight to or sufficiently stress his length of service, his unblemished disciplinary record, or the severity of the penalty.

Mr. Rousseau was discharged for incidents that occurred in 1990, 1991, 1992 and 1993. The incidents of 1990, 1991 and 1992 were not related to the incident in 1993. The years of 1990, 1991 and 1992 until October were years when Mr. Rousseau was in the management ranks and outside of the bargaining unit. Mr. Rousseau returned to the bargaining unit in October 1992.

Prior to the arbitration hearing, Mr. Rousseau saw the union general chairman and counsel, along with the other engineer whose case was also being heard that day. Other than giving Mr. Rousseau a copy of the brief to be presented at the arbitration hearing, counsel did not raise any relevant issues with Mr. Rousseau. The complainant did not approach counsel to make any additions or changes because as counsel was not prepared to make any changes to the brief before, it was even more unlikely that he would do so now. Other than Mr. Rousseau asking whether it would be necessary to call for witnesses on his behalf and counsel advising that it would not, there was no further discussions between Mr. Rousseau and counsel. At the arbitration hearing, Mr. Rousseau attempted to make submissions on his own on one occasion; however, counsel put up his hand to stop Mr. Rousseau and said no.

Counsel's Testimony

Counsel acted on behalf of the BLE at the arbitration hearing concerning Mr. Rousseau's dismissal. He has had extensive training and approximately 25 years

experience in labour relations law and in representing trade unions, particularly in the railway industry.

Counsel received Mr. Rousseau's grievance file from the union somewhere between 30 and 45 days before the arbitration hearing. The file was reviewed and a draft arbitration submission was prepared by counsel and an associate. Before the arbitration preparation meeting, Mr. Rousseau telephoned counsel to get a confirmation that counsel had received the information he had prepared for the BLE.

Discussion commenced with Mr. Rousseau's notice of termination (Exhibit A-3), points for a three-step grievance document (Exhibit A-2, page 4), and the statement provided to the CN police (Exhibit U-4). Afterwards, counsel, the union general chairman and the complainant went through the draft submission line by line. Mr. Rousseau okayed the changes. Mr. Rousseau had no further suggestions concerning the brief. Counsel left the room to get his secretary to make the necessary changes, as he wanted Mr. Rousseau to leave the meeting with a final copy of the brief. Counsel testified that he had in his possession the entire file which he had received from the union general chairman. Although these documents were not reviewed line by line at the arbitration preparation meeting, they were available for reference when necessary. There was discussion about Exhibits A-3 and A-2 and the statement that Mr. Rousseau had given to the police (Exhibit U-4). Counsel explained the CROA process to Mr. Rousseau.

Counsel could not recall when cross-examined major changes to the brief. Although he testified that he had made changes to the brief, he could not assess whether they were major. He stated that at no time during the preparation meeting did he say that he was not there to rewrite the brief.

Mr. Rousseau called counsel the following Monday to talk about the arbitration process. Counsel stated that he did not oppose making changes to the brief and

advised the complainant during the Monday telephone conversation that if there were to be any changes or additions, they would have to be done that day. According to counsel, the complainant advised him that he was quite satisfied with the brief. The complainant and counsel did not discuss the matter further until the hearing in Montreal.

On the day of Mr. Rousseau's hearing, another grievance was also scheduled for hearing before the same arbitrator.

Counsel saw the complainant at the hearing. He gave the complainant a copy of all documents that would be used in the hearing, which he asked the complainant to look over, and explained the process (company proceeds first, caucus, the case at hand, then final submissions). Counsel gave Mr. Rousseau paper and told him to write out any concerns or questions that came to mind during the hearing.

There was some discussion about witnesses being available to testify as the company had subpoenaed Messrs. Malloy and Walton as possible witnesses. These two individuals were excluded from the hearing. Their lawyer was allowed to remain in the hearing. The arbitrator stated that he did not feel the need to hear viva voce evidence or to call witnesses.

Counsel testified that he met with Mr. Rousseau outside the hearing room immediately following the arbitration presentation. He indicated that Mr. Rousseau said that he had done a fine job, then departed.

Counsel did not tell, nor did he consider telling, the complainant that he had or may have had rights under Part III of the Code.

The union general chairman did not testify at the section 37 hearing. At the end of the day on January 16, 1995, counsel who had cross-examined Mr. Rousseau and examined counsel for the union at Mr. Rousseau's arbitration hearing advised the Board that the union general chairman would be unavailable to testify on the following day because of a meeting scheduled in Montreal.

Argument

Counsel for the union submitted that the union had a duty of fair representation towards the complainant because the complainant was a locomotive engineer and a member of the BLE bargaining unit at the time of his dismissal; and because the complainant had filed a grievance in accordance with the BLE collective agreement. The union further submitted that the complainant had no rights under section 240(1) of Part III of the Code because that provision does not apply to managers and also because the discharge had occurred more than 90 days after the alleged events.

Counsel for the union submitted that the union and its counsel retained the right not to put forward certain submissions. The complainant did receive the quality of representation that is consistent with the Board's case law, and therefore the union had fulfilled its duty under section 37 of the Code.

The motivating factor behind this section 37 complaint is the complainant's dissatisfaction with the outcome of the arbitrator's decision and not with the way the union or its counsel prepared and handled the submissions at arbitration. Counsel asked the Board to consider that the complainant's evidence was self-serving because he consistently told everyone that he had been wronged, yet he stated that he might have pleaded guilty to get a lighter penalty so as not to lose his job. This, contends

counsel, had an effect on his credibility before the arbitrator. The arbitrator also considered the fact that the complainant did not trust the company; the relationship was irreparably damaged.

Counsel for the complainant submitted that the section 37 complaint is against the union not the union's counsel. The union's duty of fair representation is not fulfilled because it files a grievance, proceeds to arbitration and hires a lawyer. The section 37 duty requires that the union investigate, make fair and reasonable inquiries, and turn its mind to the grievance and to the circumstances surrounding the grievance.

The complainant prepared and sent three documents to the union general chairman to help in preparing his dismissal grievance. The provision of these documents does not relieve the union of its duty to conduct an investigation of a grievance and to reasonably turn its mind to its merits. The union failed to conduct an investigation of the complainant's discharge beyond reading the documents prepared by the grievor and relying on the employer's submissions during the grievance procedure. And it failed to communicate to its counsel the serious nature of the complainant's grievance because it failed to conduct a thorough investigation.

Counsel further submitted that the Board did not hear any evidence from the union because its general chairman failed to appear before the Board. This is the subject matter that is at the heart of the section 37 complaint. The union general chairman was the critical element. He could have provided answers about the investigation conducted by the union. There was no need for the union's counsel to be a witness, and that evidence should be questioned by the Board. Counsel gave no evidence as to what the union did or did not do, nor could he have. He was not in a position to know. The Board does not know what the union did do or did not do other than it hired a lawyer to prepare and present the complainant's case at arbitration. The union failed to answer the complainant. What the union did was throw the matter on the conduct of its counsel. The union did not put its mind to the complainant's case.

There is no evidence to indicate that the complainant tried to run his own defence. The complainant's behaviour does indicate that he tried to get the union to turn its mind to his grievance. According to the evidence, two arbitration cases were reviewed with the respective grievors in about one and a half hours by counsel with the union general chairman in attendance. When Mr. Rousseau made specific requests, he was told by counsel that he was not there to rewrite the brief. Moreover, the union general chairman would have certainly been made aware of Mr. Rousseau's position and concerns about the draft arbitration brief during the drive home with Mr. Rousseau from Ottawa to Scarborough.

Additionally, the union did nothing for Mr. Rousseau when it found out that Mr. Malloy had been reinstated. The union did not advise or attempt to advise the arbitrator of Mr. Malloy's reinstatement, particularly in light of the arbitrator's reliance on Mr. Malloy's discharge and of the arbitrator's supplementary award. Nor did the union attempt to seek judicial review of the arbitration award. This coupled with the letter from Ms. Whent in September 1994 which contradicts the statement submitted by CN to the arbitrator reinforces the fact that the union had an obligation to at least bring it to the arbitrator's attention.

The salient events on which CN relied to terminate Mr. Rousseau occurred while he was excluded from a bargaining unit, and not a member of the BLE. The union had an obligation to narrow the issues for discipline to those that occurred while he was a member of the BLE. Mr. Rousseau would have had recourse under section 240 of Part III of the Code for those events on which the employer relied while Mr. Rousseau was not a member of the BLE.

Counsel for the employer submitted that the legal test for the union's duty of fair representation is outlined in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509, at page 527. He further submitted that where there is conflict in the evidence, that of counsel is to be preferred over that of Mr. Rousseau because

of the corroboration with documentation and notes submitted, and in view of counsel's demeanour, professional training and reputation.

Mr. Rousseau's credibility was at issue before the arbitrator and is also at issue here. Mr. Rousseau denied both knowledge of and involvement in the unauthorized free railcar movements for which he was investigated by CN's management and subsequently dismissed; yet, Mr. Rousseau did acknowledge knowing of a general practice whereby CN employees used CN equipment because of the isolation of Hornepayne. This, he submitted, was at the heart of Mr. Rousseau's credibility.

Counsel for the employer maintained that the evidence clearly supported the following submissions of the union: it had properly provided serious and substantial efforts to advance Mr. Rousseau's position; it had retained experienced counsel; it had reviewed the complainant's submissions and summaries and incorporated them into a draft brief; it had consulted the brief line by line with Mr. Rousseau; it had made some changes; it had given Mr. Rousseau further opportunities to comment on the draft brief; arguments had been presented on all elements including those of severity and service; the union had proceeded professionally, fairly, without discrimination, and without evidence of failure to duly represent Mr. Rousseau; Mr. Rousseau's representation had been undertaken with integrity and competence, without serious or major negligence, and without hostility towards Mr. Rousseau.

Analysis of the Duty of Fair Representation

Section 37 of the Canada Labour Code defines a union's duty of fair representation as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation

of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

This provision proscribes behaviour that is "arbitrary," "discriminatory" or in "bad faith." What kind of manner, action, conduct or decision can be characterized as "arbitrary," "discriminatory" or in "bad faith"?

The duty of fair representation arises from the exclusive power given to a bargaining agent to act as spokesperson for the employees in a bargaining unit. The right to take a grievance to arbitration is reserved to the union. Employees do not have an absolute right to arbitration. The union enjoys considerable discretion which must, however, be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the nature of the grievance, its consequences for the employee and the union's legitimate interests. The union's decision must not be arbitrary, capricious, perfunctory, discriminatory or wrongful. Also the union's representation must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.

Negligence is distinguishable from arbitrary, discriminatory or bad faith behaviour. The concept of negligence can range from simple negligence to gross negligence. The damage to the complainant in itself is not the test. Simple negligence may result in serious damage. Negligence in any of its variations is characterized by conduct or inaction due to inadvertence, thoughtlessness or inattention. Motivation is not a characteristic of negligence. Negligence does not require a particular subjective state of mind as does a finding of bad faith. There comes a point, however, when mere/simple negligence becomes gross/serious negligence, and we must assess when this point, in all circumstances, is reached.

When does negligence become "serious" or "gross"? Gross negligence may be viewed as so arbitrary that it reflects a complete disregard for the consequences. Although negligence is not explicitly defined in section 37 of the Code, this Board has commented on the concept of negligence in its various decisions. Whereas simple/mere negligence is not a violation of the Code, the duty of fair representation under section 37 has been expanded to include grossly/serious negligence. See Kenneth Cameron (1980), 42 di 193; and [1981] 1 Can LRBR 273 (CLRB no. 282); Brenda Haley (1980), 41 di 295; [1980] 3 Can LRBR 501; and 81 CLLC 16,070 (CLRB no. 271); Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304); Andre Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319); Jean Laplante (1981), 40 di 235; and [1981] 3 Can LRBR 52 (CLRB no. 320); and Jacques Lecavalier (1983), 54 di 100 (CLRB no. 443). The Supreme Court of Canada commented on and endorsed the Board's utilization of gross/serious negligence as a criteria in evaluating the union's duty under section 37 in Guy Gagnon et al., *supra*. The Supreme Court of Canada reconfirmed the utilization of serious negligence as an element to be considered in Centre hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330.

Where there is an allegation of negligence or where the Board finds that a union is guilty of negligence in its decision-making process, its decisions, its behaviour or its

actions or lack thereof, these criteria will assist the Board in determining whether or not there has been "serious or gross negligence." The facts of each case will determine that conclusion.

The determination of whether a decision is "discriminatory" is based on the presence or absence of an invidious intention.

"Bad faith" refers to a subjective state of mind or conduct which has been motivated by ill-will, hostility, dishonesty, malice, personal animosity, political revenge, lack of fairness or impartiality, lack of total honesty such as withholding information, flagrant dishonesty such as lying, or sinister purposes. Motivation or intent is involved.

Before being able to decide whether section 37 has been violated, the Board must, in every instance, analyze the nature of the grievance filed, the characteristics of the bargaining agent, and the steps taken by the bargaining agent in fulfilling its duty toward the complainant member of its bargaining unit. The primary focus in a section 37 complaint is on the conduct of the union and of its officers and agents. To avoid arbitrariness, the union must rationally consider the relevant factors. A union must process grievances genuinely and not merely perfunctorily or superficially. In handling a grievance, a union must ascertain the facts giving rise to the grievance from all necessary sources. In short, a union must take a reasonable view of the issue before it and make a judicious decision after considering the various relevant and conflicting considerations. The duty of fair representation does not require a union to be infallible. A union can make a mistake, provided this mistake is not the product of arbitrary, seriously negligent or discriminatory behaviour or bad faith. Everything depends on the particular circumstances and facts on which the union based its decision.

Evidence relating to the behaviour of the BLE and of its representatives is what is relevant. Under section 37, what is the standard of conduct required of the union and its decision-makers? The standard must take into account the persons who are performing the functions, the norms of the industrial community and the measures and solutions that have gained acceptance. See Stanley Dwyer (1991), 86 di 144 (CLRB no. 904).

Union decision-makers must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. Some relevant questions to be addressed (but not necessarily limited to) by the Board include the following: Must the union conduct an investigation of the circumstances surrounding Mr. Rousseau's dismissal in order to discharge its duty under section 37 of the Code? If so, to what degree must the union, its representative or its agent conduct an investigation. Did the BLE do such a poor job of considering and assessing the seriousness of the complaint that it acted arbitrarily? Did the union conscientiously turn its mind to the matter affecting the complainant and did it arrive at a decision that might be arguable but certainly not unreasonable? Did the BLE perfunctorily handle Mr. Rousseau's case? Was there any serious negligence apparent in its handling of the case? In this case, the union proceeded to expedited arbitration under the BLE collective agreement. And must the union, knowing the facts of the case, analyze the arbitration process and the award, and offer guidance to the complainant in terms of possible subsequent action? Did the union, subsequent to such arbitration, have to take other action or to inform the complainant of the possibility of applying for judicial review of the award? If so, did the union's failure to follow up on the award, in the circumstances, amount to conduct that was arbitrary, perfunctory or seriously negligent?

This section 37 complaint deals with a situation where an employee's job and career are on the line. This type of situation demands that the union and its officers give utmost attention and care. Allegations of such violations will be scrutinized closely by the Board.

The Board has no mandate to look into the merits of the grievance itself. Its role and responsibility is limited to the way the grievance was handled. At times the facts relating to the merits of a grievance cannot be separated from the process. The Board is of the opinion that it must closely examine the merits in order to understand fully the process followed by the union in representing a complainant. Its duty under section 37 is to scrutinize the process to ensure that the individual was treated in accordance with the appropriate standard of care contemplated by the Code. The Board recognizes that its role is strictly limited to deciding whether or not, in a particular case, the bargaining agent breached its duty of fair representation. See Jacques Lecavalier, supra; and Gary W. Craib (1984), 58 di 47; and 85 CLLC 16,006 (CLRB no. 489).

In section 37 complaints, the Board must focus on the conduct and attitude of the union and of its officers and agents. It must determine whether the union conducted a full and serious investigation, in consultation with all persons concerned, and whether the union examined all allegations or whether the situation was treated in a cavalier fashion. See Anne-Marie Rainville (1992), 88 di 30 (CLRB no. 936).

This complaint is not the normal type of section 37 complaint where the union has refused or neglected to refer a grievance to arbitration. The grievance at issue did proceed to arbitration, indeed to expedited arbitration rather than formal arbitration. It was heard and the arbitrator rendered a decision.

The Board will take into account the degree of sophistication of the bargaining agent during its deliberations in determining whether or not the union discharged its duty of fair representation. It recognizes that the services bargaining agents can provide to their members vary because some unions are better equipped financially and administratively than others. Therefore, the Board will investigate thoroughly the steps taken by the bargaining agent, keeping in mind the union's abilities, sophistication and

characteristics. Its investigation will include an inquiry into the normal practices, policies and criteria the union follows in similar cases.

Effect of the Union Obtaining a Legal Opinion on the Duty of Fair Representation

Obtaining legal advice is a very strong defence for a union in a fair representation complaint. The Board examines this factor in assessing whether the union fulfilled its duty to "turn its mind" to the grievance in a way that is thorough, genuine and not arbitrary or capricious. Another factor is the use of counsel to conduct the arbitration. By obtaining legal assistance and counsel to research, prepare and deliver a grievance to arbitration, do the union's obligations and duty under section 37 become fulfilled? This factor must be viewed bearing in mind all circumstances of the case. Notwithstanding the fact that the union sought and obtained a legal opinion and legal assistance, the "exclusive power" still belongs to the union. The duty of fair representation always belongs to and remains with the union. The duty does not shift to its lawyer or to any other agent at any time during the grievance process. Nor does the use of a lawyer serve as an absolute defence with regard to a section 37 complaint.

By relying on the advice and using the services of its counsel, can the BLE say that it has fulfilled its duty of fair representation? Considering the evidence, the nature of the complaint, the characteristics of the bargaining agent, and the steps taken by the bargaining agent, the Board is not convinced that the use of counsel in this case immunizes the union from a finding that it breached its duty of fair representation.

Role of Employer Counsel in Section 37 Proceedings

The Board's practice is well established in the following cases: Vincent Maffei (1979), 37 di 102; [1980] 1 Can LRBR 90; and 79 CLLC 16,202 (CLRB no. 218); Robert

Hogan (1981), 45 di 43; [1981] 2 Can LRBR 389; and 81 CLLC 16,132 (CLRB no. 324); Lucio Samperi (1982), 49 di 40; [1982] 2 Can LRBR 207; and 82 CLLC 16,172 (CLRB no. 376); André Gagnon (1986), 63 di 194 (CLRB no. 547); Jacqueline Brideau (1986), 63 di 215; 12 CLRBR (NS) 245; and 86 CLLC 16,012 (CLRB no. 550); William Tomlinson (1986), 68 di 20 (CLRB no. 599); Gordon Newell (1987), 69 di 119 (CLRB no. 623); Cathy Miller (1991), 84 di 122 (CLRB no. 854); and Anne-Marie Rainville, *supra*.

In Vincent Maffei, *supra*, the Board made the following comments:

"... The employer will be a party in all cases but the inquiry will not enter into the merits of employer action unless it is so intimately bound to the union's action to be impractical or improper to separate it. The employer is added as a party in each case under section 118(o). Adjudication on the merits of the employer's actions will be a remedial process and the Board will normally defer to arbitration where applicable..."

The Board will operate on this procedure until experience and argument persuades us there is a more practical or fair procedure."

(pages 112; 97-98; and 447)

The Board further examined the issue of the employer's role in section 37 complaints in Robert Hogan, *supra*, where it stated:

"... the employer is given notice and full opportunity to participate... Although the employer is not a 'party' as defined as one against whom a complaint is made, it is a person who may be directly affected and therefore entitled to participate in the proceedings. It may choose not to participate or merely supply information to the Board, but it is afforded the rights of a party. In strict legal terms the employer may not be properly characterized as a party. A more precise legal description may be interested person. To date the Board has not chosen to make the distinction... We have viewed this approach as the best method of ensuring employers will have the full right to protect their interests..."

(pages 52-53; 395-396; and 872)

In André Gagnon, supra, the Board stated:

"It is Board practice, in the name of minimum fair play toward the complainant, to ask the employer to keep a very low profile in cases involving a contravention of section 136.1, at least with respect to the merits of the complaint. On the other hand, it will be asked to come to the fore in the matter of remedies that will counteract the negative consequences of such an unfair labour practice, if the Board were to grant such relief."

(page 206)

This view was also reiterated in William Tomlinson, supra, at page 21.

Although the Board adds the employer as a party to section 37 complaints, the employer is not on trial unless there is an allegation of collusion between the union and the employer. The issue in a section 37 complaint is one between complainants and their unions. The employer is requested to participate only with respect to issues that need clarification or to the extent it may be directly involved and have an interest. See Jacqueline Brideau, supra, and Gordon Newell, supra.

The sole employer interest the Board acknowledges and recognizes in section 37 complaints has to do with the direct cost of any remedy should the Board grant the complaint. See Cathy Miller, supra. The Board will not accept the employer acting as a second defence for the union. The Board will not investigate the merits of employer action unless it is so intimately bound to the union's action as to be impractical or improper to separate them. See Vincent Maffei, supra, and Lucio Samperi, supra.

If the Board grants a section 37 complaint, the employer will be given the opportunity to make submissions on the question of remedy because this issue could have an impact on both the employer and the union.

Effect of Failure to Call a Witness Who Knows the Facts

The failure of the union to call its general chairman, together with the last-minute notice of his unavailability, is highly suspect considering that this hearing was scheduled on November 18, 1994 and, at no time, was there any indication that the union representative who played such a crucial role in Mr. Rousseau's grievance and complaint was not available.

In section 37 complaints, and particularly where an employee's job and career are at stake, the interests of unions in pursuing their mandate and those of boards in reviewing union's decisions and actions must be balanced.

Failing to call a witness who could testify to the facts at issue is not without significance. We could infer that the unproduced testimony would have contradicted the case of the party affected or at least would not have supported it. In this instance, the union general chairman was not called to testify. The evidence from that union representative considering the role he played in the investigation into the merit of the complainant's grievance, in preparing the complainant's arbitration hearing, in the complainant's hearing, in discussions with the employer regarding Mr. Malloy's reinstatement, in representing the union's and the complainant's interests at the same time in this section 37 complaint and considering the contradictory evidence between the complainant and the union legal counsel in this section 37 complaint, the evidence of the union general chairman is critical. This evidence is within the power of the union general chairman. He has knowledge of the facts that are at issue. See Murray v. City of Saskatoon, [1952] 4 W.W.R. (N.S.) 234 (Sask. C.A.). Also of particular interest is the union general chairman's experience and expertise.

Board's Jurisdiction Under Section 37 Re Arbitrator's Decision

In 1982, the Board stated that the duty of fair representation has a role under the Code but it must have its limits. That limit falls short of being an avenue of appeal from arbitral decisions based on a judgment by the Board's legally and non-legally trained members about the competence and performance of union representatives and their counsel. See Lucio Samperi, supra, at pages 51; 215; and 710.

Under section 58 of the Code, an arbitrator's decision is final and binding. This provision reads as follows:

"58.(1) Every order or decision of an arbitrator or arbitration board is final and shall not be questioned or reviewed in any court.

(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain an arbitrator or arbitration board in any of his or its proceedings under this Part."

The arbitration process proceeds separate and apart from the processes over which the Board has jurisdiction. The Board therefore does not and cannot assume the role of arbitrator and decide the merits of a grievance.

Rearbitration cannot be ordered by the Board because of the final and binding status given to an arbitral award under the Code. Parliament has not given the Board any authority to alter, upset, overrule or interfere in any way with the disposition of the case by the arbitrator. This is confirmed in Gendron v. Municipalité de la Baie-James, [1986] 1 S.C.R. 401.

In 1990, in Centre hospitalier Régina Ltée, supra, the Supreme Court of Canada did say that a union's duty of fair representation does not cease once the grievance has

gone to arbitration. This duty can continue after an arbitral award is issued. There may be a duty on the union to seek judicial review subject to Gendron v. Municipalité de la Baie-James, *supra*. That judgment gave the Board an opportunity to revisit the issue of the union's duty of fair representation under section 37 with respect to a grievance that has already gone to arbitration and a decision rendered and its responsibility to at least consider, if not seek, judicial review.

In 1991, the Board stated in Ian G. Black (1991), 86 di 38 (CLRB no. 890):

"... that the duty of fair representation under the Code has been restricted to apply only to employee rights that flow from the collective agreement that is applicable to them. It seems to us that it would be stretching the language of the section far beyond what was intended to suggest that an employee is entitled to judicial review of an arbitrator's decision as a right under a collective agreement. ..."

(page 42)

The Board held, in that case, that nothing could be done under section 37 of the Code about the complainant's dissatisfaction with the outcome of the arbitrator's award (page 45).

In another 1991 decision, the Board considered the issue of circumstances where bargaining agents' decisions could appear to be arbitrary, discriminatory or made in bad faith in judicial review situations and the desirability for the Board to have powers to intervene in such situations. The Board commented in Aditya N. Varma (1991), 86 di 66; 15 CLRB 307; 92 CLLC 16,020 (CLRB no. 894):

"... the Code does not create a right of judicial review, nor does the collective agreement which CUPW administers. That right exists at law outside of and apart from the union's statutory role under the Code..."

... CUPW's decision not to pursue judicial review is outside the scheme of collective bargaining and mandatory dispute resolution mechanisms contemplated by the Code to which the union's duty of fair representation is attached.

This is supported in our view by the substance of and the clear intent behind section 58 of the Code which provides that arbitration awards flowing from collective agreements under the Code are final and binding and are not to be reviewed in any courts. For the purposes of the Federal Court Act, which is the normal avenue for redress from matters arising from the Code, and arbitrator or an arbitration board pursuant to a collective agreement under the Code is deemed not to be a federal board, commission or other tribunal within the meaning of the Act. In the face of these specific restrictions, it seems highly improbable that the legislators would have intended this Board to scrutinize actions by bargaining agents related to judicial review under its supervisory powers in section 37. Even more unlikely is the possibility that Parliament intended that the Board would exercise its remedial powers under section 99 of the Code to order a bargaining agent to initiate judicial review proceedings which the very construction of the Code attempts to prohibit.

There may be circumstances where decisions by bargaining agents about judicial review possibilities could appear to be arbitrary, discriminatory or made in bad faith. ... No matter how desirable it may seem for the Board to have powers to intervene in these situations, it is our respectful opinion that there is simply no jurisdiction under section 37 of the Code for the Board to do so. ..."

(pages 71-72; 312-313; and 14,151)

In Canadian National Railway Company (1995), as yet unreported CLRB decision no. 1109, the Board again said the following:

"The Board has no jurisdiction to review the decision of a grievance arbitrator and in particular, the merits of his interpretation of the relevant articles of a collective agreement. Section 58 of the Code expressly provides that these decisions are final and cannot be either questioned or reviewed..."

(pages 21-22)

Section 37 and Post-Arbitral Action

The jurisprudence is unsettled with regard to whether a union has a duty of fair representation relating to the actions it takes, or neglects to take, following an arbitral award. Generally, this Board has found that there is no continuing duty after a complainant's case has been through arbitration. See for example Ian G. Black, *supra*, and Aditya N. Varma, *supra*.

This Board has also held that judicial review is not a mandatory dispute resolution mechanism contemplated by the Code. As such, it goes beyond the parameters of section 37 and is therefore outside the scope of a union's statutory duty of fair representation. Whereas a union normally exercises considerable discretion in deciding whether or not to proceed to arbitration, it exercises complete discretion in deciding whether or not to seek judicial review of an arbitral award. The Board, therefore, will not find that a union has violated section 37 if the union did not seek judicial review of an arbitration award. See Richard Langlois, May 21, 1985 (LD 474); Gordon Newell, *supra*; Harold P. Burrell, July 15, 1988 (LD 672); and Samir Boulos, October 20, 1993 (LD 1222), where the Board stated:

"Judicial review is not a mandatory dispute resolution mechanism contemplated by the Code. Accordingly, a union which normally exercises considerable discretion in deciding whether or not to proceed to arbitration... exercises complete discretion in deciding whether or not to seek judicial review of an arbitral award. It follows from this that judicial review, as it falls outside the scope of a union's statutory duty to represent, also falls outside the ambit of section 37 of the Code. A joint reading of sections 37 and 58 of the Code supports this view."

(page 4)

However, the Supreme Court of Canada, in Centre hospitalier Régina Ltée, *supra*, stated that a union's duty of fair representation does not cease once a grievance has

gone to arbitration. This duty can continue after an arbitral award is issued. The distinction is between "reviewing" a decision of the arbitrator (which we expressly do not do here), and making certain that the union fulfils the full extent of its duty of fair representation, to ensure that the complainant has obtained all possible benefits from the collective agreement and its enforcement mechanism, i.e. arbitration (which we examine here). The union's duty in this regard may extend past the date of an arbitral award. As the Board found in Tony P  p  , October 4, 1993 (LD 1212):

"Under section 58 of the Code, every order or decision of an arbitrator is final. The Board does not have the jurisdiction to review decisions of arbitrators (see Teamsters Union Local 938 et al. v. Gerald M. Massicotte et al., [1982] 1 S.C.R. 710; (1982), 134 D.L.R. (3d) 385; and 82 CLLC 14,196; Richard Langlois, May 21, 1985 (LD 474); and Brotherhood of Railway, Airline and Steamship Clerks, System Board of Adjustment no. 435 v. Canadian Pacific Air Lines Limited et al., file no. CA-001759, June 19, 1984 (B.C.C.A.)).

*The Board's role in reviewing the union's duty of fair representation under section 37 is to examine the conduct of the union and its representatives and to ensure that the trade union does not act in a manner that is discriminatory, arbitrary or in bad faith. (See Luc Gagnon (1992), as yet unreported CLRB decision no. 939). However, the union's duty under section 37 does not end at the moment the grievance is referred to arbitration; it may continue even after the arbitrator renders a final decision. The Board has jurisdiction to review union representation during the arbitration process and during the implementation period of the award. (See Lucio Samperi (376), *supra*; and Centre Hospitalier Regina Lte   v. Labour Court [1990] 1 R.S.C. 1330)."*

(page 4; emphasis added)

The case before us is not the usual type where arbitration has dealt with all the salient issues. Many issues were left outstanding. The initial incidents for which the complainant was dismissed took place when he was not in the bargaining unit and not covered by the collective agreement under which the arbitrator had jurisdiction to

adjudicate the matter. The union did not generally question the facts as set out by the employer and relied too much on the employer's version. It did not, for example, question why Ms. Whent's statement was not in the format that the company had said it was, and why Ms. Whent had not signed or initialled her statement. The union, even though it was represented by experienced counsel, did not advise the complainant of the option of seeking redress pursuant to section 240 of Part III of the Code. The event that triggered the dismissal took place at a time when the complainant was no longer in a position of authority. Those who actually took part in the proscribed activity were also dismissed, but their unions took action prior to and even subsequent to their arbitrations to alleviate their penalties. That was not done by the BLE for the complainant, even in the face of the letter the employer sent to the Crown attorney, dated March 17, 1994, effectively minimizing the seriousness of the conduct of these employees. Of all the employees dismissed, the complainant is the only one for whom dismissal remains in effect.

Onus

The onus in section 37 complaints rests initially with the complainant. It can be shifted to the union once the complainant has adduced sufficient evidence to support a prima facie breach of the Code. The union must then demonstrate that it took reasonable steps in order to have been able to make a decision with full knowledge of all relevant facts. See Kenneth Cameron, supra.

The question the Board must address in this instance is the following: has the complainant met his onus sufficiently to shift the burden on to the union? We find that he has.

Section 240 of Part III of Canada Labour Code - Unjust Dismissal

Section 240 reads as follows:

"240. (1) Subject to subsections (2) and 242(3.1), any person

(a) who has completed twelve consecutive months of continuous employment by an employer, and

(b) who is not a member of a group of employees subject to a collective agreement,

may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

(2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.

(3) The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority."

Section 240 allows for a complaint to be made within 90 days of the date the person, who is not a member of a group of employees subject to a collective agreement, was dismissed. Section 242(3.1) excludes persons laid off due to lack of work or discontinuance of a function, and persons who have another mode of statutory redress, neither of which are applicable here.

Mr. Malloy grieved his discharge under section 240 of the Code. Rather than have this discharge referred to arbitration under that section, CN decided to settle the matter and reinstate Mr. Malloy. The grievor was to be reinstated not in his former supervisory position, but rather in a UTU bargaining unit position. Mr. Malloy accepted the reinstatement. The complainant was not given advice in respect of that

section of the Code, and the union did not address its applicability to Mr. Rousseau's case.

Analysis of the BLE's Conduct

This section 37 complaint involves arbitrariness and the notions of capriciousness, cursoriness and perfunctoriness, not discrimination or bad faith.

The conduct of the union's counsel in refusing to review the facts contained in the documents submitted by Mr. Rousseau with the complainant in any substantive way during the arbitration preparation hearing, and his statement to the effect that he was "not there to rewrite the brief or make major changes" cannot be ignored by this Board. There was conflicting evidence concerning the briefing of Mr. Rousseau by counsel for the union. Counsel testified that Mr. Rousseau had telephoned him on the Monday following the arbitration preparation meeting to ask what type of arbitration process would be used. Mr. Rousseau testified that the lawyer only told him of the process in a restaurant prior to the arbitration itself. The Board prefers the evidence of the complainant since union's counsel has many cases to remember, whereas Mr. Rousseau has only one. The Board is left wondering, therefore, if the arbitration preparation meeting was properly carried out, why Mr. Rousseau had to wait so long to find out what sort of hearing he would have. Was this matter not discussed at that meeting?

The reliance by counsel for the union on Mr. Rousseau's request that his dismissal grievance be dealt with through the expedited arbitration process rather than through formal arbitration is without merit. In any event, the final decision rests with the union, not with the grievor. The union should have considered the consequences of the type and timing of arbitration process used. A system of expedited arbitration, such as the one under the CROA, and the submission of written statements may be acceptable for minor offenses or for situations where facts or credibility are not at

issue. However, when a critical job interest is at stake, this process may result in an arbitrator drawing unfair or inaccurate conclusions. A document standing alone cannot be cross-examined, nor can a document's veracity and the circumstances under which it was written be tested. This may be critical to the outcome.

Notwithstanding, the focus is on the union's conduct rather than on its counsel's conduct. The Board must ask itself, and then determine, whether the union's conduct as revealed by the evidence was perfunctory in light of the seriousness of the penalty imposed. Were the steps taken by the union representative sufficient and consistent with the seriousness of the issue?

There is no evidence that the union general chairman had taken the time during the investigation of the grievance or at any time during the grievance procedure to review with Mr. Rousseau the facts contained in the documents the complainant had prepared. Furthermore, there is no evidence that the union general chairman or any other union official (except union representative Woehl) conducted any kind of investigation of the facts surrounding Mr. Rousseau's dismissal. Mr. Woehl had gone as far as he could in alerting the union general chairman to some of the possible problems with the case, and it was then up to the general chairman or his delegate to fulfil the duty found in section 37 of the Code and the Board's jurisprudence.

Had the union conducted a thorough investigation, it would have discovered that the events on which the employer had relied to terminate the complainant had happened while he was not a member of the BLE; it may have seen the difference and distinction between knowledge of what Mr. Malloy did and knowledge of the practice to look the other way; and it may have discovered why the complainant did not give a copy of his statement to the employer but to the CN police. The union's actions were merely perfunctory. It gave the appearance of fulfilling its section 37 duty by referring the dismissal grievance to arbitration, hiring a lawyer, giving the lawyer all

the documents it had in its possession, and accompanying the grievor to the arbitration preparation meeting and arbitration hearing.

The union representative should have made inquiries about the dismissal, particularly since the complainant had an exemplary work record. The arbitrator should have been directed only to the time period that the complainant was a member of the BLE. That is the only jurisdiction that the union had. That was the only time period that the arbitrator had jurisdiction to act. Anything that occurred (if anything did, in fact, occur) while the complainant was in a supervisory capacity was beyond the jurisdiction of the BLE collective agreement and therefore also beyond the arbitrator's jurisdiction.

The BLE is an experienced union with sufficient resources and full-time staff, and its union general chairman is a full-time and experienced union representative. The evidence has established that Cliff Hamilton, general union chairman, is the union official responsible for handling Mr. Rousseau's dismissal grievance up to arbitration.

In the absence of any meaningful explanation or evidence from the union, the evidence in no way indicates that the union general chairman or anyone else in the union had investigated the facts of the grievance other than read and rely on Mr. Rousseau's submissions. Additionally, the union relied on the employer's documentation, facts and submissions, and did not attempt to verify those facts. There is no indication that the union's handling of Mr. Rousseau's grievance was anything more than superficial or perfunctory.

Although the Board has held in some decisions that the duty of fair representation does not create a right for the complainant to apply for judicial review or, by logical extension, create a duty for the union to take other action subsequent to an arbitral award (Ian Black, supra, and Aditya N. Varma, supra), those decisions were not considered in light of what the Supreme Court of Canada found in Centre hospitalier

Régina Ltée, supra. The Tony Pépé decision, supra, was considered in the light of Centre hospitalier Régina Ltée, supra; we therefore prefer the reasoning therein. As a result, we do not consider ourselves bound by a principle stating that the duty of fair representation always ends the moment an arbitral award is issued.

In this case, several salient factors should have prompted the union to ensure that Mr. Rousseau got the full protection of his collective agreement subsequent to the initial award by the arbitrator:

- the employer's own downplaying of the seriousness of the use of company property in this case (CN's letter, March 17, 1994 to the Crown Attorney);

- Ms. Whent's clarification of her evidence (her letter September 26, 1994, reproduced above);

- the actions taken by the other union on behalf of conductors Beatty and Walton;

- the result that Mr. Rousseau, after 24 years of service with an unblemished record, was the only employee in this situation dismissed.

For all the foregoing reasons, the Board finds that the union general chairman failed to undertake a proper investigation of Mr. Rousseau's case and that the union's handling of Mr. Rousseau's dismissal and the subsequent arbitration was wholly superficial and perfunctory. Furthermore, considering that a union's duty can continue after an arbitral award is issued, the particular circumstances of this complaint allow the Board to find that the BLE and, in particular, the union's general chairman, Mr. Cliff Hamilton, violated section 37 of the Code.

Remedy

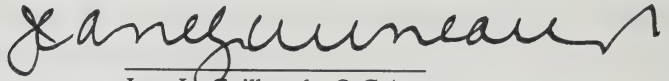
The Board, after due consideration of all the circumstances of this case, believes that the union breached its duty of fair representation. Once a breach of section 37 is found, we must order a remedy calculated to compensate the complainant for the damages suffered. In this case, we are not able to order the union to take action or to institute proceedings that would remedy the situation. We are then left to order payment of damages.

We hereby order the union to pay to the complainant a sum equal to:

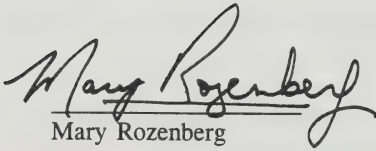
1. the amount billed to the complainant by his counsel in respect of Board hearings into this matter plus interest; and
2. the salary the complainant lost from the date of his dismissal to the date of this decision plus interest;
3. if however, there is any delay in carrying out the payment order, we maintain our jurisdiction on the question of damages, should it be necessary.

The Board appoints Peter Suchanek, Regional Director and Registrar, Ontario, to assist the parties in determining the quantum of this order and in fulfilling its intent.

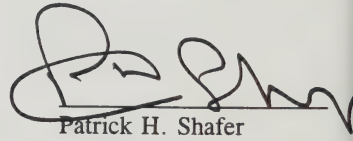
Should the parties require further assistance, they may come back before the Board to resolve outstanding matters relating to remedy, and for this purpose we reserve jurisdiction.



Jean L. Guilbeault, Q.C./c.r.
Vice-Chair



Mary Rozenberg
Member



Patrick H. Shafer
Member

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Information

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Summary

Terry G. Jorgenson, *employee*, and Canadian Pacific Limited, *employer*.

Board File: 950-298
CLRB/CCRT Decision no. 1128
July 10, 1995



These reasons deal with the referral of a safety officer's decision to the Board under section 129(5) of the Canada Labour Code.

The applicant, a locomotive engineer, invoked his right to refuse dangerous work on December 20, 1994 because his vision was partly blocked by pacesetter/speedometer equipment mounted on top of the console. This mounting did not give him a clear and unobstructed view from the front center window of the locomotive from a sitting position. This coupled with the seat mounting tripod which was larger than normal put the seat further away from the wall which did not allow him to see around the equipment without the necessity of leaning to the right around this equipment. The applicant also had a medical condition which added to his concern.

A safety officer from Transport Canada investigated the work refusal. Following an investigation into the matter, he found that such a situation did not constitute a danger within the meaning of the Code.

After inquiring into the circumstances of the safety officer's decision and the reasons, the Board determined that it was satisfied with the

Résumé

Terry G. Jorgenson, *employé*, et Canadien Pacifique Limitée, *employeur*.

Dossier du Conseil: 950-298
CLRB/CCRT Décision n° 1128
le 10 juillet 1995

Les présents motifs traitent du renvoi au Conseil d'une décision d'un agent de sécurité aux termes du paragraphe 129(5) du Code canadien du travail.

Le 20 décembre 1994, le requérant, un mécanicien de locomotives, a invoqué son droit de refuser d'effectuer un travail dangereux parce que sa vue était en partie obstruée par l'équipement indicateur de vitesse fixé à la console. L'emplacement de l'équipement l'empêchait de bien voir par la fenêtre avant de la locomotive lorsqu'il était assis. En outre, le pied du siège qui était plus gros que la normale faisait que le siège était trop éloigné du mur; s'il voulait voir autour de l'équipement, il devait se pencher vers la droite. Par ailleurs, le requérant avait des problèmes de santé, ce qui ajoutait à ses préoccupations.

Un agent de sécurité de Transports Canada a mené une enquête concernant le refus de travailler. À la suite de son enquête, il a jugé que la situation ne constituait pas un danger au sens du Code.

Après avoir mené une enquête sur les circonstances de la décision de l'agent de sécurité ainsi que sur les raisons de la

safety officer's finding and confirmed the decision.

décision, le Conseil a confirmé la décision dont il était convaincu de la validité.

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Reasons for decision

Terry G. Jorgenson,

employee,

and

Canadian Pacific Limited,

employer.

Board File: 950-298

CLRB/CCRT Decision no. 1128

July 10, 1995

The Board was composed of Ms. Mary Rozenberg, sitting as single member panel pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health). In accordance with section 130(1), an inquiry was held on March 3, 1995 in Vancouver.

Appearances

Mr. Gerry Ranson, Union Legislative Representative, Division 320 of the Brotherhood of Locomotive Engineers, assisted by Mr. Walter Plomish, Union Legislative Representative, Local 422 of the United Transportation Union, for Mr. Terry G. Jorgenson;

Mr. Lloyd P. Trainor, Safety Officer, for Transport Canada; and

Mr. Glen Wilson, Counsel, assisted by Mr. Ross Hunt, Labour Relations Officer, and Mr. Roger Forsberg, Manager of Operations, for Canadian Pacific Limited.

These reasons deal with the referral to the Board of a safety officer's decision under section 129(5) of the Code.

This referral arose from a refusal to work exercised by an employee of Canadian Pacific Limited (CP Rail) on December 20, 1994. The applicant, Mr. Terry Jorgenson, invoked his right to refuse dangerous work because his vision was partly

blocked by the pacesetter and speedometer equipment mounted on top of the console. A Labour Canada safety officer investigated the refusal and made a finding of "no danger" on December 21, 1994.

On December 28, 1994, Mr. Jorgenson requested that the safety officer refer his decision to the Board and authorized the union legislative representative for division 320 of the Brotherhood of Locomotive Engineers (BLE) to represent him in this matter. The safety officer referred his decision to the Board on January 4, 1995.

The Facts

At the beginning of his shift on December 20, 1994, Mr. Jorgenson placed a call to the Area 1 shop foreman office. Mr. Barry Greaves, assistant operations co-ordinator and diesel shop foreman, was asked to go to locomotive unit 5803 located on the shop track because of Mr. Jorgenson's safety concerns. Mr. Jorgenson asked him to relocate or remove the pacesetter/speedometer equipment which obstructed his view and to try the locomotive engineer's seat. After Mr. Greaves did try that seat, Mr. Jorgenson asked him what he thought. Mr. Greaves told Mr. Jorgenson that he had no difficulty seeing the track. (The Board noted that both the foreman and the employee have very similar statures.) Mr. Jorgenson then asked Mr. Greaves to cover his right eye and to describe what he saw. At that point, the foreman stated that his vision was obstructed. The supervisor said that he would not remove the equipment because it was standard equipment and because he did not think the equipment was a safety hazard in that particular location. Moreover, he did not have an alternative location in the locomotive cab for the equipment. Although not required by Mr. Jorgenson to perform his duties, the equipment is needed at the end of his run for inspection purposes.

Mr. Jorgenson then asked Mr. Carpenter, the General Yard Master, to remove the equipment or to arrange for its removal. The General Yard Master declined to do so,

indicating that he would make a note of the request and the reason for it. Mr. Jorgenson indicated that he could not operate the locomotive if the equipment was not removed.

The Manager of Operations at Coquitlam, Mr. Roger Forsberg, received a phone call from the General Yard Master after 14:00 hours and was advised of the refusal. Mr. Forsberg went to the shop track accompanied by a health and safety representative to find out about the employee's concern and to attempt to resolve the matter. When he arrived at the locomotive unit, Mr. Jorgenson, the applicant, Mr. Ranson, the union health and safety representative, and Mr. Greaves, the shop foreman, were present. The assigned conductor was not there; he was waiting in the yard office. Mr. Forsberg asked Mr. Jorgenson about his concerns, and then tried the locomotive engineer's seat. Mr. Forsberg did not think that the location of the equipment constituted a dangerous situation and that the unit was a safety hazard. Mr. Jorgenson then stated that he refused to move the train from the shop track until the equipment was removed. Mr. Forsberg contacted safety officer Trainor by cellular telephone from unit 5803. Mr. Jorgenson also spoke to the safety officer. The safety officer stated that he would be out to investigate in about 45 minutes. Two safety officers, Messrs. Trainor and Murray, showed up. All parties had an opportunity to speak.

Mr. Jorgenson had operated locomotives with this type of equipment similarly installed before, but this was the worst he had seen. He had previously invoked his right to refuse to work, but the problem that had prompted him to do so had been resolved. On three previous occasions, Mr. Jorgenson had requested that the pacesetter/speedometer equipment be removed. These requests had been granted. It had taken approximately 15 minutes to remove this equipment. On another occasion

the tripod which allowed the seat to move closer to the wall and provide a better view of the track from the window had been changed.

Mr. Jorgenson indicated that at the time of the refusal he was feeling some back pain. He had reported for duty and said he had been "willing to give it his best shot". He had attended a back-care program. This program focuses on back injury prevention and teaches ways to avoid injury and proper posture techniques. According to Mr. Jorgenson, it is not possible to sit using correct posture as instructed and have a clear view of the road bed at the same time. To see clearly, a locomotive engineer must lean to the right. This causes fatigue and pain in the right arm and elbow, which in turn brings about lack of concentration. Staying in one position as required for his job is not conducive to correct posture, nor is it realistic for the duration of a shift. Mr. Jorgenson indicated that his back condition does not prevent him from doing other kinds of activities. He has no restrictions concerning twisting or turning. He is involved in various sports for exercise and preventive back injury.

Mr. Jorgenson believed a dangerous condition existed because he could not see the track. He noted that when various crew members are out on the track, a dangerous situation could exist, because he cannot see the track or them if they are on the left side of the unit.

Mr. Jorgenson is familiar with the way to address concerns about cab comfort and with an ergonomic evaluation of locomotive cab seating study. This study resulted from complaints by locomotive engineers about various CP work stations. Mr. Jorgenson has also been a member of the Local Cab Committee for two or three years. He is aware of safety condition reports submitted to the Local Cab Committee. He has himself submitted reports concerning the locomotive engineer's seat, the seat's alignment and the location of the pacesetter. In 1994 he submitted 13 safety condition reports. Some of his complaints were settled and others were not. As a member of the Local Cab Committee, Mr. Jorgenson indicated that submitting safety condition

reports was part of his job. He is aware of the health and safety legislation and of his duties. He likes to think that he does a good job.

Walter Plomish, a conductor with CP Rail (and a member of the United Transportation Union (UTU)), indicated that duties prevent a conductor from constantly looking at the track and that a conductor does not always remain in the cab with the locomotive engineer because he must attend to his own duties. He stated that a number of safety condition reports were processed through the health and safety committee from January 1994 to mid-June 1994. These could not be dealt with locally so it was decided to refer them to the CP Cab Committee. The union wanted answers. According to Mr. Plomish, a number of the safety condition reports were held in abeyance in Montreal and were not being processed through the Cab Committee. The company refused to process these reports which, according to Mr. Plomish, violates the Code. Mr. Plomish indicated that in keeping with the Board's previous decisions (Walter Plomish, November 30, 1992 (LD 1088); and Terence J. Grams (1994), 95 di 29 (CLRB no. 1079)), the union had exhausted all avenues. Mr. Jorgenson, he added, is well aware of the situation because he (Mr. Jorgenson) and Mr. Ranson keep each other well informed. Mr. Plomish was not a member of the cab crew on December 20, 1994, nor was he in the Coquitlam yard when Mr. Jorgenson invoked his right to refuse to work under Part II of the Code.

The Safety Officer's Investigation

The original call about this refusal went to Labour Canada, which transferred the call to Transport Canada for investigation.

Safety officer Trainor received a phone call at approximately 14:30 on December 20, 1994 regarding a work refusal at CP Rail. After an initial phone call to Mr. Jorgenson and to CP management, Mr. Trainor consulted with his supervisor and another safety officer, Mr. Murray West. Mr. Trainor requested that safety officer West assist him

in investigating the refusal because of Mr. West's background as a locomotive foreman.

Safety officers Trainor and West arrived at the Coquitlam yard at approximately 15:40. They were met by CP supervisors Forsberg and Carpenter and immediately proceeded to unit 5803, where Terry Jorgenson, locomotive engineer, and Gerry Ranson, union safety and health representative, were waiting. The work refusal registration form was immediately filled out.

Safety officer Trainor asked locomotive engineer Jorgenson to demonstrate the dangerous situation. Locomotive engineer Jorgenson said that he had invoked his right to refuse to work under Part II of the Code because his view was partly blocked by the pacesetter/speedometer equipment mounted on top of the console. Additionally, he stated he had a medical condition that did not allow him to lean to the right for long periods. He also claimed that the seat's tripod was larger than normal, placing the seat further away from the wall, thereby preventing him from seeing around the equipment.

The safety officers considered Mr. Jorgenson's comments about his medical condition and questioned him about his medical condition during the investigation. Mr. Jorgenson told the safety officers that he was medically certificated with no restrictions; and that he was fully certified and licensed to operate the equipment. The safety officers also noted that Mr. Jorgenson's last doctor's report in November 1994 indicated no repetitive, heavy lifting; however, Mr. Jorgenson was not doing any repetitive or heavy lifting while sitting.

Both safety officers tried the seat and looked out the window. They noted that the window was 15 inches, and approximately 3 to 4 inches was obstructed by the equipment. When seated, Mr. Jorgenson had to lean to the side. The seat has some mobility allowing the occupant to reach the controls.

The locomotive unit was stationary on the shop track during this time. To get a different perspective the safety officers requested that the unit be moved approximately 10 car lengths taking it out onto a tangent (straight) track, which was done. The safety officers observed Mr. Jorgenson during this time. They noted that he twisted around in his seat to look to the right and back to ensure it was safe to move the unit before proceeding.

Mr. Ranson took a walk outside the unit along the left rail of the track. Safety officer Trainor was able to see Mr. Ranson at the left hand rail level, about 35 meters in front of the locomotive. He also took a walk outside the unit to investigate further. He was able to look at Mr. Jorgenson to see the position of his face. Safety officer West remained in the unit standing behind Mr. Jorgenson to view his seating position. He noted that the applicant was sitting appropriately and not exaggerating his posture.

The safety officer's investigation included questioning all individuals in attendance. The employer representatives were asked whether the pacesetter/speedometer equipment was installed recently, whether other locomotive units in service had this equipment and whether the equipment was in the same location. CP Rail has 21 such units of equipment and most of them have been in service for at least 15 years. The location of the pacesetter/speedometer in this particular unit (5803) was standard. The applicant and the union safety and health representative were asked whether the location of the equipment on the 5800 class type unit was brought to the attention of the Safety and Health Committee. The response was yes, but nothing was done.

After discussing the matter in private, the safety officers convened a meeting with Mr. Jorgenson, union safety and health representative Ranson, and employer representatives Carpenter and Forsberg. After reviewing the definition of "danger" as contemplated by the Code, they stated that they could not uphold the refusal as they could not identify a danger as contemplated in the Code. They confirmed their "no danger" finding the next day in writing.

Although the safety officers took pictures during their investigation, the pictures did not turn out. The safety officers therefore relied on their own observations, recollections and the notes they took at the time of the investigation. They also relied on the Canadian Railway Operating Rules which, if followed properly, protect against accidents and contemplate what to do in potential situations.

During the Board inquiry, safety officer Trainor stated that although he found that the pacesetter equipment to some extent blocked Mr. Jorgenson's view, the obstruction was not such that it fit in the definition of danger as contemplated by the Code. He further stated that although the location of the equipment was not ideal, it did not create a dangerous situation as contemplated by the Code. If he were asked for input on the redesign to the locomotive engine, he would have suggestions and would definitely make changes; however, this is not within his mandate as he could find no danger as contemplated by the Code. At issue here are Mr. Jorgenson's personal preferences.

When questioned about Mr. Jorgenson's back condition and to what degree it had in being or creating a dangerous condition, the safety officer replied that he did not know and that he was to determine if a danger existed not to discuss Mr. Jorgenson's health.

The safety officer noted that the conductor worked on the left side of the unit and that he should have a clear view on that side. The applicant responded that were a pedestrian to walk on or near the track on the left side, he would not be able to see the pedestrian in time to stop. When the applicant questioned the safety officer about the possibility of instituting a one-man operation, the officer replied that this was not a one-man operation situation; it was not allowed by Transport Canada. The safety officer said that he was aware of a conductor's duties as he had been on approximately 125 trains and had logged 10 000 miles over 10 years, in addition to his previous rail and investigative experience.

At the inquiry, the Board received various documents pertaining to the Cab Committee, an ergonomic evaluation of locomotive cab seating report, safety condition reports, back-care program self-help manual, and photographs taken by both management representatives and union representatives. Much of this information is not strictly relevant to Mr. Jorgenson's refusal, but does provide useful background information on the subject matter at issue in the work refusal.

The Cab Committee

The Cab Committee held its first meeting on October 24, 1990. It provides a forum for train crews (represented by the UTU and BLE) and management to discuss items of mutual benefit and concern pertaining to the design, maintenance and operation of locomotive cabs. It seeks to achieve an acceptable system standard. Union representatives on the Cab Committee act on behalf of their organizations and convey to their membership the status of the various issues that are discussed. All communications between the UTU and BLE representatives and management are channelled through the system labour relations department in Montreal. Where necessary that department advises and consults the business units on issues that the running trades wish to raise for the Cab Committee's consideration.

Ergonomic Evaluation of Locomotive Seating Report

This study (dated July 8, 1991) was requested by CP Rail and prepared for CP Rail by an ergonomics engineer with an American-based organization, Humantech Inc., for the 1990-91 period. Involved in the study were (among other CP personnel) CP locomotive engineers, the CP Rail Locomotive Cab Committee, and CP management. The BLE and the UTU also supported the study. The study was aimed at identifying seating factors and cab factors that affect cab crew comfort/performance during main line operations, making recommendations for retrofitting current seats and cabs, and specifying criteria that could enhance crew performance when new cabs are

purchased. It included an overall crew member evaluation of seats and a survey of 93 crew members on the importance of seat design features and adjustment issues. The results would serve as a basis for future specification of locomotive seats, for new engine deliveries and for replacement specifications acceptable to labour and management.

This study brought about a range of recommendations for the short, medium and long term. Short-term recommendations were quick fixes that were implemented rather than permanent solutions. Medium-term recommendations required moderate costs and implementation time frames. Long-term recommendations were the near ideal solutions requiring changes and process modifications for consideration in the development of the next generation locomotive.

The lower back was the primary area of pain and discomfort for locomotive engineers. The neck ranked second. The upper back, right shoulder and elbow were also identified as areas of pain and discomfort. According to the report, locomotive engineers attributed their pain and discomfort to the poor seating alignment of the engineer's seat and the lack of visibility outside of the cab. Additionally, engineers identified lack of proper height adjustability, poor seat maintenance, seat pans angled to one side, and wobbly seats as conditions that undermined body support and contributed to fatigue.

The study reported that seats were currently misaligned by as much as 6 to 8 inches which meant that engineers had to stretch their neck and place undue pressure on the right shoulder and elbow while twisting/bending the lower back. Additionally, vibration contributed to engineer discomfort and fatigue while in this position. Recommendations included providing a bracket for alignment purposes, removing shims or installing new brackets to move the seats closer to the wall.

Furthermore, the study reported that visibility is critical to the safety of the train and its crew, and recommended that the space required by the pacesetter/speedometer and other equipment be redesigned to provide for more visibility.

The report indicated that physical discomfort constitutes a problem for cab personnel and that seating design may affect operator comfort, performance, and health. It also indicated that operator performance deteriorates when there is a design mismatch between mental/physical capabilities of crew members and functional design requirements. The key is therefore to provide seating that improves the safety of the crew member and comfortably accommodates the majority of the crew member population.

The Submissions

The safety officer submitted that Mr. Jorgenson's refusal dealt with potential situations. The union felt frustrated that it could not get the employer to do anything through the Cab Committee. The safety officer further submitted that although the legislation under Part II is restrictive, that is all that he has to work with; his job is to investigate the refusal in order to determine if a danger exists, as contemplated by the Code, and then to make a determination.

The union submitted that an immediate danger did exist at the time of Mr. Jorgenson's refusal, and would exist even more once the locomotive was set in motion. Mr. Jorgenson's view out of the window and on the left side of the track and railway bed was obstructed by the pacesetter/speedometer equipment. Additionally, the engineer's seat was mounted more to the left than usual, further restricting the employee's view of the track. These two factors caused Mr. Jorgenson's seat to be misaligned. The position of the pacesetter/speedometer created an unsafe operating condition. Mr. Jorgenson requested two management personnel to remove this equipment as it served no function in the performance of his duties as a locomotive

engineer, nor was it needed to complete his tour of duty. These requests were turned down.

The union contended that the safety officers could not see what the applicant had seen. The fact that someone else might have found the visibility adequate does not alter the fact that the applicant's view was at issue here (see VIA Rail Canada Inc. (1989), 78 di 211 (CLRB no. 761)). It must therefore be assumed that a danger did exist and that the danger was immediate and real.

Furthermore, the union submitted on behalf of the applicant that the adverse effects of poor posture, while seated, is well documented in the railway industry. When the locomotive was free of the pacesetter/speedometer equipment, Mr. Jorgenson's vision of the track was unrestricted; he did not have to lean to the right and he did not experience back problems. In making his determination, the safety officer relied on the conductor being always present in the locomotive. This assumption prompted the safety officer to err in his investigation, and his report was further flawed by the fact that the conductor did not, at all times, view the left road bed.

The union believed that the danger still existed and asked the Board to issue a direction which should have been issued by the safety officers on the day of Mr. Jorgenson's refusal. The union was unable to get the Cab Committee to do anything concerning the subject matter at issue in Mr. Jorgenson's refusal. This (the work refusal and referral of the safety officer's decision) is all that we can do. Sections 126(1)(c), (d), and (g) all support Mr. Jorgenson's position.

The union asked the Board to order the employer to remove all pacesetters that restrict the vision of the locomotive engineer. Additionally, it asked the Board to direct CP Rail to ensure the seat and seating brackets are properly aligned with the center of the locomotive engineer's front window.

The company submitted that it fully appreciates and respects employees' right to invoke their right to refuse to perform unsafe work in accordance with Part II of the Code. It also acknowledged that there is room for improvement with respect to communications. Furthermore, the employer is committed to upgrading its locomotives and has already upgraded 306 units.

At issue in Mr. Jorgenson's refusal are his personal concerns about comfort and safety. A single locomotive cannot be tailored to an individual's preferences. The needs and requirements of many must be considered.

The employer has been using the equipment at issue for approximately 20 years. The design of the unit may not comply with the most ideal ergonomic standards or with Mr. Jorgenson's personal preferences, but it does not present a danger to Mr. Jorgenson within the meaning of the Code (see Adrien Mathon (1990), 82 di 144 (CLRB no. 824). This issue should be addressed through the Cab Committee.

The Law

It is natural to expect employees to be concerned about safety in the work place. The safety provisions contained in Part II of the Code are intended to ensure that employers provide a safe working environment. Under Part II of the Code, both employees (section 126(1)) and employers (sections 124, 125 and 126(2)) must take all reasonable and necessary precautions to ensure the safety and health of employees and any persons likely to be affected by an employee's acts or omissions.

When the Board receives a referral, it must place itself in the shoes of the safety officer and enquire into the circumstances of the refusal and the officer's reasons for making a no-danger finding. As such, the Board must analyze the safety issue that was the subject of the work refusal, investigate the problem identified by the employee and assess whether the potential for danger was so acute that corrective measures needed

to be taken before the employee could safely perform his duties. The Board must look at the nature of the safety issue and the refusal and the attention the safety officer gave to those matters.

When the Board hears an application for review of a safety officer's decision under section 129(5), it is governed by section 130(1) of the Code which stipulates that its jurisdiction is limited to reviewing the circumstances and the reasons for the safety officer's decision. The Board has no general power to go beyond this. It must determine whether at the time of the safety officer's investigation, the pacesetter/speedometer equipment constituted a danger to Mr. Jorgenson within the meaning of the Code. For the Board to reach a different conclusion, it would have to find that the safety officer's investigation was not conducted in a proper manner, or that the definition of danger used by the safety officer in making his determination was at odds with that found in Part II of the Code.

Parliament did not intend that the Board deal with danger in the broadest sense of the word. Danger within the meaning of section 122(1) of the Code is immediate and real. The risk to employees must be serious to the point where the machine or thing or the condition created may not be used until the situation is corrected. The right to refuse to work is an emergency measure to be used to deal with situations where employees are faced with immediate danger and where injury is likely to occur right there and then. It cannot be a danger that is inherent in the work or that constitutes a normal condition of work. Nor is the possibility of injury or potential for danger sufficient to invoke the work refusal provisions. This provision must not be used as a vehicle for attaining the objectives of Part II of the Code or for resolving labour relations issues and disputes. Where such refusals coincide with other labour relations disputes, the Board will pay particular attention to the circumstances of the refusal.

See Scott C. Montani (1994), 95 di 157 (CLRB no. 1089); Terence J. Grams, *supra*; Walter Plomish, *supra*; Stephen Brailsford (1992), 87 di 98 (CLRB no. 921); Ceasare

Peretti (1991), 86 di 157 (CLRB no. 906); David Pratt (1988), 73 di 218; and 1 CLRB (2d) 310 (CLRB no. 686); William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332); and Ernest L. LaBarge (1981), 47 di 18; and 82 CLLC 16,151 (CLRB no. 357).

The Decision

The Board is aware of the Canadian Railway Operating Rules, which, if followed properly, protect against accidents and that assigned crew are to be qualified, licensed and certified according to these rules which requires, among other things, that crew be familiar with these rules. In carrying out their various work assignments, crew members and other railway employees must exercise caution and obtain clearances in accordance with the operating rules.

There was no evidence that at the time of Mr. Jorgenson's refusal or of the safety officers' investigation, there was in fact a danger within the meaning of Part II of the Code.

It is quite evident from the material and evidence presented at the Board's inquiry that locomotive seating as well as cab design and maintenance have been matters of general and ongoing concern between the BLE, the UTU and CP Rail. It is apparent that at the Coquitlam yard, the unions felt that the Cab Committee was not moving quickly enough (if at all) to address their concerns.

A review of all of the evidence and submissions leads the Board to conclude that the subject matter of Mr. Jorgenson's refusal is an ergonomics issue rather than a safety issue. The Board finds that the safety officer fully considered all relevant matters and facts surrounding Mr. Jorgenson's refusal during his investigation before arriving at

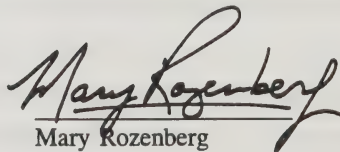
his finding of no danger. Accordingly, the Board confirms the safety officer's decision.

Before closing, the Board reiterates what it said in David Pratt, supra:

"... because a safety officer or the Board finds that there is no immediate danger to an employee ... it does not mean that danger in the strict sense of the word does not exist at all. There may still be reason enough for the circumstances to be investigated further through the safety and health committees or representatives with a view to reducing the risk of injury or illness, ... into the long-term effects of the hazard or condition that caused the employee's anxiety in the first place."

(pages 226; and 318)

Although the Board confirmed the safety officer's finding in this instance, the Board reminds the parties that under Part II of the Code, both employees (section 126 (1)) and employers (sections 124, 125 and 126(2)) must take all reasonable and necessary precautions to ensure the safety and health of the employees and any persons likely to be affected by an employee's acts or omissions. Safety and health should not and must not be compromised by either employers or employees.


Mary Rozenberg
Member

information

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Summary

Communications, Energy and Paperworkers Union of Canada, Local 141, *applicant*, and Provost Cartage Inc./Provost Bulk Transport Inc. and Clarke Transport Canada Inc., *employers*.

Board File: 585-522
CCRT/CLRB Decision no. 1129
July 4, 1995

Résumé

Syndicat canadien des communications, de l'énergie et du papier, section locale 141, *requérant*, ainsi que Les Transports Provost Inc./Provost Bulk Transport Inc. et Clarke Transport Canada Inc., *employeurs*.

Dossier du Conseil: 585-522
CCRT/CLRB Décision n° 1129
le 4 juillet 1995

Application seeking a declaration of sale of business pursuant to section 44 of the Canada Labour Code.

The Board found that it did not have jurisdiction with regard to the transportation operations of a group of undertakings. To reach this decision, the Board had to examine the aim sought by the undertaking, which prompted it to consider the divisibility issue. It concluded that it had before it an enterprise that was constitutionally divisible and that the various aspects of the enterprise were not sufficiently integrated, and not sufficiently interdependent, to turn that enterprise into an interprovincial transportation business. Each element of the enterprise, that is, each division, constitutes a separate, visibly self-sufficient going concern. The Board applied the criteria of constitutional characterization in order to determine whether the subordinate or incidental undertaking fell under federal jurisdiction because its activities were necessary to the operation of a federal core undertaking. It found that the criteria was not met in this case. The Board therefore dismissed the section 44 application.

Demande visant à obtenir une déclaration de vente d'entreprise conformément à l'article 44 du Code canadien du travail.

Le Conseil a conclu qu'il n'avait pas compétence à l'égard des activités de transport d'un groupe d'entreprises. Pour arriver à cette conclusion, le Conseil a dû déterminer la finalité de l'entreprise, ce qui l'a mené à se pencher sur la question de sa divisibilité. Il a conclu que l'on était ici en présence d'une entreprise divisible au plan constitutionnel et que les différents volets de l'exploitation n'étaient pas suffisamment intégrés, ni suffisamment interdépendants pour en faire une entreprise de transport interprovincial. Chaque élément de l'ensemble de l'exploitation, à savoir, chaque division, constitue une entreprise active, distincte et visiblement autonome. Il a appliqué le critère de qualification constitutionnelle en vue de déterminer si une entreprise subordonnée ou accessoire relevait de la compétence fédérale parce que ses activités étaient nécessaires au fonctionnement d'une entreprise fédérale principale. Il a déterminé que ce critère n'était pas satisfait en l'espèce. Le Conseil a donc rejeté la demande fondée sur l'article 44.

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LES MOTIFS DE DECISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Communications, Energy and Paperworkers
Union of Canada, Local 141,

applicant,

and

Provost Cartage Inc./Provost Bulk Transport
Inc. and Clarke Transport Canada Inc.,

employers.

Board File: 585-522
CCRT/CLRB Decision no. 1129
July 4, 1995

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Mr. François Bastien and Ms. Véronique L. Marleau, Members. A hearing was held on March 15 and 16, June 2 and 3, and September 15, 1994, at Montréal.

Appearances

Mr. Laurent Roy (Trudel, Nadeau, Lesage, Larivière et Associés), accompanied by Mr. Alain Trudel, National Representative, CUPE, for the applicant union,
Messrs. Michel Towner and Yves Turgeon (Byers Casgrain), accompanied by Mr. Serge Leclerc, Vice-President, for Clarke Transport Canada Inc.,
Mr. Benoit Turmel (Martineau Walker), accompanied by Mr. Pierre Lefebvre, Vice-President, Human Resources, for Provost Cartage Inc./Provost Bulk Transport Inc.

These reasons for decision were written by Ms. Véronique L. Marleau, Member.

I

The Application

These reasons for decision deal with an application filed pursuant to section 44 of the Canada Labour Code (Part I - Industrial Relations) by the Communications, Energy and Paperworkers Union of Canada, Local 141 ("the union"). The union alleged that Provost Cartage Inc./Provost Bulk Transport Inc. ("Provost") sold part of its business to Clarke Transport Canada Inc. ("Clarke") when, on August 3, 1993, it entered into three contracts with Clarke, retroactive to July 19, 1993. The contracts provided for the transfer from Provost to Clarke of all rights and interests held by Provost in the gypsum products transportation contract it had entered into with the Canadian Gypsum Company Limited ("Canadian Gypsum"), the leasing of certain equipment and the provision of certain services.

The union represented Provost employees who were assigned to perform the gypsum transportation contract, and a collective agreement signed on July 1, 1993 by the union and Provost was in force when the contract was transferred. This agreement expires on April 30, 1996.

The union alleged that said transfer constitutes a sale of business within the meaning of the Code and that, under the successorship provisions, it continues to be the bargaining agent of Clarke employees who now carry out these duties. It also alleged that the purchaser remains bound by the collective agreement in force covering all employees responsible for transporting gypsum products for Canadian Gypsum and by the related transportation contracts now being performed by Clarke.

Clarke and Provost challenged these allegations. Clarke submitted that the Board lacked jurisdiction to deal with the application and to regulate Clarke's labour relations since Clarke is a provincial undertaking that carries on its activities solely in the province of Quebec. For a sale of business within the meaning of the Code to occur, the seller and the purchaser must both come under federal jurisdiction. The

union, on the other hand, argued that the employer operates an interprovincial transportation business that falls within federal jurisdiction.

The Board heard the parties on the issue of its jurisdiction. These reasons deal solely with this question.

II

The Matter at Issue

To determine whether a sale of business within the meaning of the Code has occurred, the Board must first conclude that the purchaser operates a federal work, undertaking or business. As the Board stated in Burns International Security Services Ltd. and Canada Post Corporation (1989), 78 di 39; and 3 CLRBR (2d) 264 (CLRB no. 746):

"... However, for there to have been a sale of business under the Code, the seller and the purchaser must both fall within federal jurisdiction; there are no successor rights bridges between federal and provincial entities. ..."

(pages 41; and 265)

The issue in this case, then, is whether Clarke operates a local undertaking or, rather a federal undertaking within the meaning of section 92(10)(a) of the Constitution Act, 1867, as an undertaking "connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province."

However, as the Board pointed out in Larose-Paquette Autobus Inc. (1990), 80 di 105; and 14 CLRBR (2d) 132 (CLRB no. 792):

"Before we can characterize a business as federal or provincial, we must first, as it were, identify the business. This process must not be confused with the process of determining whether a provincial

undertaking is incidental or vital to the operation of a core federal undertaking (Byers Transport Limited et al. (1986), 65 di 127; and 12 CLRB (NS) 236 (CLRB no. 571))."

(pages 118; and 144)

To answer the question of whether the purchaser comes under federal jurisdiction, the Board must therefore determine the purpose of the business and, at the same time, ascertain whether all components of the operation form a single, integrated and indivisible undertaking that is engaged in a regular federal activity, thereby making the whole federal.

III

Applicable Principles of Constitutional Law

A. The Legislative Basis of the Board's Constitutional Jurisdiction

The Board's constitutional jurisdiction to deal with labour relations is set out in section 4 of the Code which defines the general application of Part I (Industrial Relations):

"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."

Section 2 of the Code defines "federal work, undertaking or business" as follows:

"'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

(a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,

(c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,

(d) a ferry between any province and any other province or between any province and any country other than Canada,

(e) aerodromes, aircraft or a line of air transportation,

(f) a radio broadcasting station,

(g) a bank,

(h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces, and

(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces;

(j) a work, undertaking or activity in respect of which federal laws within the meaning of the Canadian Laws Offshore Application Act apply pursuant to that Act and any regulations made under that Act."

In this case, it is paragraph (b) of this definition that is likely to establish the Board's jurisdiction in respect of the alleged purchaser. This definition is based on the wording of section 92(10)(a) of the Constitution Act, 1867, which provides:

"92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, —

...

10. Local Works and Undertakings other than such as are of the following Classes: —

a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province; ..."

B. Criteria for Determining Whether a Work or Undertaking Is Local or Federal

Under the applicable criteria for determining constitutional status, there are two ways in which an employer's business may be considered as coming under federal jurisdiction and hence the Canada Labour Code. First, and as the union contended in this case, the business may be considered an interprovincial transportation business, that comes within the scope of section 92(10(a) of the Constitution Act, 1867. In such a case, we must determine whether the employer's business is in itself a federal undertaking by reason of the nature of its activities. Second, if the employer's business cannot in itself be considered a federal undertaking, it may nevertheless be deemed to come under federal jurisdiction if it can be established that it is an integral part of an existing federal work or undertaking. In that case, jurisdiction depends rather on a finding that the employer's business is essential to a federal undertaking in that its normal and habitual activities as a going concern are vital, essential or integral to the core federal undertaking.

Chief Justice Dickson of the Supreme Court of Canada, summarized the methods of determining constitutional status in United Transportation Union v. Central Western Railway Corp., [1990] 3 S.C.R. 1112, at pages 1124-1125. Earlier, in Northern Telecom Limited v. Communication Workers of Canada et al., [1980] 1 S.C.R. 115, the Chief Justice summarized as follows the principles outlined earlier by Beetz, J.,

in Construction Montcalm Inc. v. Minimum Wage Commission et al., [1979] 1 S.C.R. 754, which underlie these two approaches:

"(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.

(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of a 'going concern', without regard for exceptional or casual factors, otherwise, the Constitution could not be applied with any degree of continuity and regularity."

(Northern Telecom, supra, page 132)

As this statement recalls, legislative primacy in labour relations matters rests with the provincial legislatures (Toronto Electric Commissioners v. Snider and Others, [1925] 2 D.L.R. 5 (P.C.)), but certain matters fall within the legislative authority of the Parliament of Canada and in those cases, which are the exception, the labour relations

that are an integral part of the operation of federal undertakings will themselves be subject to federal jurisdiction and hence to this Board's jurisdiction (Re Eastern Canada Stevedoring Company Limited, [1955] S.C.R. 529; and Commission du salaire minimum v. Bell Telephone Co. of Canada, [1966] 59 D.L.R. (2d) 145 (S.C.C.)).

1. Purpose of the Business

As the Board noted in Larose-Paquette Autobus Inc., *supra*:

"The nature of a business will ultimately determine where constitutional jurisdiction over labour relations that are an integral part of the business lies (Canada Labour Relations Board et al. v. City of Yellowknife, [1977] 2 S.C.R. 729, and (1977), 77 CLC 14, 073).

*In order to determine the nature of an operation, one must look at its normal activities as a going concern (Commission du salaire minimum v. Bell Telephone Co. of Canada, *supra*; Construction Montcalm Inc. v. The Minimum Wage Commission et al., [1979] 1 S.C.R. 754; Northern Telecom No. 1, *supra*. Conversely, regard must not be had to casual or exceptional factors that may mark the existence of a business (Agence Maritime Inc. v. Conseil canadien des relations ouvrières et al., *supra*)).*

Finally, since federal jurisdiction is the exception, the burden of proof rests with the party that makes the claim (Maska Munpower Inc. (1984), 57 di 193 (CLRB no 487)). "

(pages 117-118; and 143)

It is in fact on the basis of a teleological concept that the local or federal nature of a business is assessed constitutionally. Although the ultimate purpose of any business is inevitably profit, clearly this is not the type of purpose at issue here; rather it is the purpose associated with the activities in which the undertaking engages to achieve the ultimate objective. We are attempting here to characterize the business in order to

identify the sector in which its operates within the meaning of section 2 of the Code or "the matter coming within the class of subjects enumerated," in the words of the Constitution Act, 1867, to which its activities correspond.

From a constitutional standpoint, a business *"is characterized by the presence of certain elements essential to the operation of a viable economic vehicle, without regard to the specifics of the corporate or contractual framework within which they exist"* (Larose-Paquette Autobus Inc., *supra*, pages 119; and 145, referring to Northern Telecom, *supra*, to Construction Montcalm Inc., *supra*, and to Terminus Maritime Inc. (1983), 50 di 178; and 83 CLLC 16,029 (CLRB no. 402)). Thus, for the purpose of determining constitutional status, a business must in itself constitute an independent and viable entity, a coherent and organically divisible part of an operation. There must be present the fundamental elements that enable it to carry on specific activities, namely, depending on the circumstances, the legal and technical, tangible or intangible elements that are necessary to carry on its activities. The notion of "going concern", viewed in terms of the nature of the normal and habitual activities carried on, must guide us in determining the constitutional status of an operation.

In this regard, we need to reiterate that in constitutional law, it is the facts of the particular case that are determinative and not the corporate structure of the entities in question (Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 2 S.C.R. 225, page 263 ("AGT")). See also Arrow Transfer Company Limited, [1974] 1 Can LRBR 289 (B.C.):

"In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship."

(pages 34-35, reproduced in AGT, *supra*, pages 263-264)

In AGT, supra, the Supreme Court of Canada repeated what it had said in Northern Telecom, supra, at page 134, in reaffirming the principle that constitutional jurisdiction must not vary depending on the corporate form in question:

"In the field of transportation and communication, it is evident that the niceties of corporate organization are not determinative. As McNairn observes in his article, supra, at pp. 380-1:

'A transportation or communication undertaking is a possible corporate activity but it may or may not be segregated from the total corporate enterprise or it may even be larger in scope than a single corporate enterprise. To determine questions of this nature corporate objects have a certain relevance. But of primary concern is the integration of the various corporate activities in practice (including the corporate organizations themselves if more than one is involved) and their inherent interdependence.' [Emphasis added]"

(AGT, supra, page 264)

Besides the activities carried on, the role of each component of the business and the relationship between components are therefore also relevant in making the constitutional characterization of the business and thus determining the employer's constitutional status.

2. Divisibility of the Business and Existence of Shared Constitutional Jurisdiction

In the instant case, although the application filed by the union covers "Clarke Transport Canada Inc. and its divisions", the rights that attach to the performance of the gypsum transportation contract held by Provost, and on which the union's application for a declaration of sale of business is based, were transferred to "Clarke Transport Canada Inc., Division transport de la Baie d'Hudson", which performed said contract at all relevant times. When the contract was transferred, the Division transport de la Baie d'Hudson (then Les Transports de la Baie d'Hudson Inc.) had a

separate legal status as a wholly owned subsidiary of Clarke Transport Canada Inc. Since said transfer, Clarke Transport Canada Inc. has become Newcap Inc. (following its merger with three other companies), and Les Transports de la Baie d'Hudson Inc. was dissolved to become, for operational purposes, an administrative division of Newcap Inc. (the TBH division).

Thus, like the situation that existed in Larose-Paquette Autobus Inc., *supra*, the first problem that arises in the instant case pertains to the determination of the number of businesses that Clarke/Newcap operates, if it operates more than one. The parties are divided on this issue. The union argued that, based on an examination of all the activities of Clarke and its successor Newcap ("Clarke/ Newcap"), we must conclude that this operation is indivisible and is one and the same business engaged in interprovincial activities. Clarke/Newcap, on the other hand, contended that each of its divisions constitutes a separate business that is divisible from a constitutional standpoint. It alleged that the TBH division that performs the gypsum contract is a provincial transportation business and, furthermore, that Clarke/Newcap, viewed as a whole, is not a federal undertaking but rather a provincial transportation business. Thus, we must conclude that the TBH division does not come under federal jurisdiction.

Assuming that we find that the employer's business is divisible from a constitutional standpoint and that the part at issue here comes under provincial jurisdiction, only then will we have to determine whether that part must nevertheless be characterized as federal, as a subsidiary business that is vital to a federal undertaking. If the business operated by Clarke/Newcap is found to be indivisible, it is the federal or provincial nature of the business that will be determinative; and if it is found to be divisible, with each of its divisions constituting a separate undertaking subject to a separate constitutional characterization, then the constitutional status of Clarke/ Newcap's TBH division will be determinative.

In this regard, we should point out that even though it is acknowledged that Clarke/Newcap is the employer of the employees of all administrative divisions of the company (it is acknowledged in particular that the employees of the Clark Transport (Rail Fast), Messageries Clarke and TBH divisions are all Newcap employees, just as they were previously all Clarke Transport Canada Inc. employees), from a constitutional standpoint, this does not preclude Clarke/Newcap's being able to operate several undertakings.

Determining the purpose of the business is therefore, in the instant case, inextricably linked with the question of its severability. In order to determine the purpose of the business operated by Clarke, the Board must necessarily determine whether there is shared jurisdiction, where Clarke's provincial or local activities would come under provincial jurisdiction, while its interprovincial or international activities would come under the legislative authority of the Parliament of Canada.

In Attorney-General for Ontario et al. v. Winner et al., [1954] 4 D.L.R. 657, the Privy Council dealt with the severability of a business in a case where the owner of a bus line was operating both provincial and interprovincial routes. It set out the following major principles:

"... The question is not what portions of the undertaking can be stripped from it without interfering with the activity altogether: it is rather what is the undertaking which is in fact being carried on. Is there one undertaking, and as part of that one undertaking does the respondent carry passengers between two points within the Province, or are there two?

...

No doubt the taking up and setting down of passengers journeying wholly within the Province could be severed from the rest of Mr. Winner's undertaking but so to treat the question is not to ask is there an undertaking and does it form a connection with other countries or other Provinces but can you emasculate the actual

undertaking and yet leave it the same undertaking or so divide it that part of it can be regarded as interprovincial and the other part as provincial."

(page 679)

The Privy Council concluded that the business in question was in fact one and indivisible because it engaged in both provincial and interprovincial transportation on a regular and continuous basis:

"The undertaking in question is in fact one and indivisible. It is true that it might have been carried on differently and might have been limited to activities within or without the Province, but it is not, and their Lordships do not agree that the fact that it might be carried on otherwise than it is makes it or any part of it any the less an interconnecting undertaking."

(page 680)

As the Board pointed out in J.C. Fibers Inc. (1994), 94 di 1 (CLRB no. 1057):

"This decision led the courts to consider as being under federal jurisdiction an undertaking that engages in both intraprovincial transportation and interprovincial or international transportation on a regular and continuous basis and not occasionally. (On this question, see Regina v. Cookville Magistrate's Court, Ex parte Liquid Cargo Lines Ltd., [1965] 1 O.R. 84, and (1964), 46 D.L.R. (2d) 700 (H.C.J.), pages 88-89, and 704-705. Pacific Produce Delivery and Warehouses Ltd. v. Labour Relations Board, [1974] 3 W.W.R. 389 (B.C.C.A.), page 398. Charterways Co. Limited (1974), 2 di 18; [1974] 1 Can.LRBR 161 (partial report), and 74 CLLC 16,097 (CLRB no. 4), pages 21-22, and 842-843. Wholesale Delivery Service (1972) Ltd. (1978), 32 di 239, and [1979] 1 Can.LRBR 90 (CLRB no. 154), pages 240-241; and 91; Ottawa Taxi Owners and Brokers Association (1984), 56 di 73 (CLRB no. 464), page 80; and Emde Trucking Ltd. (1985), 60 di 66; and 10 CLRBR (NS) 1 (CLRB no. 501).)"

(page 6)

Even though they have consistently resisted attempts to divide businesses in two, the courts have nevertheless recognized that this could in some cases be necessary and that they had to consider the purpose of a business as a whole in order to determine whether it is interprovincial within the meaning of the Constitution (see Re The Queen and Cottrell Forwarding Co. Ltd. (1981), 33 O.R. (2d) 486 (Div. Ct.), referring to Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commission, [1978] 2 S.C.R. 141).

Thus, in Canadian Pacific Railway Company v. Attorney-General for British Columbia et al., [1950] 1 D.L.R. 721 ("the Empress Hotel case"), the Privy Council concluded that the Canadian Pacific Railway Company was operating a severable business, subject to shared constitutional jurisdiction. In its analysis, the Privy Council formulated the question in these terms:

"The question for decision, therefore, is, in their Lordships' view, whether the Empress Hotel is a part of the appellant's railway works and undertaking connecting the Province of British Columbia with other Provinces or is a separate undertaking. A company may be authorized to carry on and may in fact carry on more than one undertaking. Because a company is a railway company it does not follow that all its works must be railway works or that all its activities must relate to its railway undertaking."

(pages 730-731)

As Micheline Patenaude pointed out in this regard in "L'entreprise federale" (1990), 31 C. de D. 1195:

"... However, just because the owner of a federal undertaking also engages in activities of a local nature does not mean that these activities are necessarily those of a federal work, undertaking or business. This is in fact what the Privy Council found in Empress Hotel when it held that the activities of the Canadian National

Railway Company in respect of the hotel that it owned were those of a local undertaking. ..."

(page 1260; translation)

IV

Analysis

What is Clarke/Newcap's purpose? Does it operate a business that is severable from a constitutional standpoint?

Clarke Transport Canada Inc. ("Clarke"), a federally chartered company and a wholly owned subsidiary of Newfoundland Capital Corporation Limited, was incorporated on December 31, 1990. Clarke was the product of the merger of Clarke Transport Canada Inc. and three other companies. At the time of the merger, Clarke headed a group of businesses consisting of a number of companies all engaged in transportation activities.

Besides operating a pool car business (i.e., loading and unloading carloads of freight) under the name Rail Fast, and a trucking business in Newfoundland, Clarke was also the sole shareholder of the following companies: (1) Les Transports de la Baie d'Hudson Inc. ("TBH"), which provided a long load trailer service specializing in the provincial bulk transportation of cement and petroleum in the James Bay region; (2) Transport Super Rapide (1990) Inc. ("TSR"), which was engaged in bulk transportation of cement between southern Quebec and the northern United States; (3) Messageries Clarke Inc. ("Messageries Clarke"), which operated a local courier service in the city of Montréal on behalf of Canada Post Corporation ("CPC"), its main customer; (4) La Traverse Rivière-du-Loup St-Siméon Limitée ("La Traverse Rivière-du-Loup"), which provided ferry service between Rivière-du-Loup and Saint-Siméon, in Quebec; and (5) Clarke Road Transport Halifax Limited, which operated a general delivery service involving the local and interprovincial transportation of

containers in Eastern Canada. Clarke Road Transport Halifax Limited (whose name was changed to 1002523 Nova Scotia Limited on October 29, 1993) was dissolved on December 10, 1993.

On December 31, 1993, Clarke Transport Canada Inc. was dissolved, and on January 1, 1994, Newcap Inc. was incorporated, the product of the merger of Clarke Transport Canada Inc. and a number of printing and broadcasting companies. Like Clarke Transport Canada Inc., Newcap Inc. is a wholly owned subsidiary of Newfoundland Capital Corporation Ltd., the parent company.

When this merger took place, the structure of this group of businesses was significantly altered. There was an internal reorganization which abolished the corporate guises of all Clarke companies, with the exception of TSR and La Traversée Rivière-du-Loup, which retained their separate legal status. These two companies became wholly owned subsidiaries of Newcap, Clarke's successor. On an operational level, however, these companies (or corporate divisions) retained a status comparable to that of Newcap's administrative divisions: TBH, Messageries Clarke, Clarke Transport (Rail Fast) (formerly Clarke Transport Canada Inc.), Clarke Transport Québec, Distribution Clarke, Clarke International, Clarke America and Sunac America. They all lost their corporate status during the reorganization.

Prior to the creation of Newcap, the Clarke Transport Group consisted of a number of companies acquired at different times in order to diversify Clarke's operations. The corporate changes that led to the creation of Newcap and the resulting dissolution of the corporate guises did not change this fact. Although Newcap diversified its operations even further, each division of this company retained its individual purpose and carried on its activities autonomously, on both a financial and operational level.

The activities previously carried on directly by Clarke Transport Canada Inc., namely, the pick-up and delivery of goods between its customers within or bordering on the

limits of a city and the railway terminal leased by Canadian National, are now performed by Newcap's Clarke Transport (Rail Fast) division. They also include the loading and unloading of railway cars at the terminal. This division handles only the arrangements for transporting goods in Canada. It is essentially a pool car business. The delivery of goods in all urban centres where Clarke/Newcap carries on such activities is entrusted to independent subcontractors. Clarke/Newcap is bound by a provincial certification in each province where it carries on this type of activity. More particularly the loading and unloading of goods is effected by employees who are represented by provincially certified unions. The headquarters of Clarke's Rail Fast division is located at the Turcot yard, a CN marshalling yard, in Montréal.

Newcap's TBH division still transports cement and petroleum in bulk within the boundaries of the province of Quebec, and more specifically in the James Bay region (from Matagami to James Bay). It is in this division that the activities consisting in the transportation of gypsum panels for Canadian Gypsum within the boundaries of the province of Quebec are carried on. Any interprovincial transportation activity necessary to perform the Canadian Gypsum contract is entrusted to another transport company, generally TSR, because TBH does not engage in interprovincial transportation. Trips made outside Quebec (Ontario and New Brunswick) in accordance with the Canadian Gypsum contract accounted for 6% of the total number of trips (113 trips outside Quebec compared with 1926 trips within Quebec in 1993). TBH's regional office is located in Matagami, but the division is managed from Montréal, in Pointe-aux-Trembles, by the same person who also manages the operations of Newcap's TSR corporate division. In Chibougamau, TBH builds winter roads and transports petroleum. Essentially, TBH specializes in bulk transportation for large projects in Quebec only; it does not carry on any transportation activity outside Quebec. Delivery is provided by independent carriers. TBH owns five tanks and leases long load trailers, but has no tractors to haul goods. The tractor is owned by the transport company which holds its own authorities and does the transporting.

Newcap's Messageries Clarke division is engaged mainly, as it was previously, in the express pick-up and delivery of small parcels for CPC in the eastern part of Montréal. The vehicles used for this purpose bear both CPC and Clarke logos. This division is also authorized, under its contract with CPC, to sell certain CPC products. However, it cannot serve other customers who offer courier services comparable to those of CPC. Like TBH, Messageries Clarke employs no drivers. It has also entered into a delivery contract with Propal, which manufactures packaging. In the past, it entered into a contract with Eaux Labrador to deliver bottled water mainly to private homes. In both cases, the area served was Metropolitan Montréal. Since the transfer of Clarke's general transportation activities to Cabano Expéditex Inc. ("Cabano") in 1990, Messageries Clarke has become a division that provides only courier service. This division employs a dozen office staff who administer the division from Ville St-Laurent, Quebec. Like TBH, Messageries Clarke entrusts all transportation activities to independent subcontractors. Newcap's Distribution Clarke division, for its part, performs a contract entered into with CPC to collect mail from postal boxes in the city of Chicoutimi.

TSR is the only Newcap division that operates an interprovincial transportation licence. It is not engaged in the general transportation business. Like all member companies of the Clark Transport Group at the time, TSR sold, in August 1990, this part of its operation to Cabano and undertook, through a non-competition agreement that excludes the bulk transportation of cement and liquids and long load trailer transportation, not to engage directly or indirectly in such activities, for a period of five years, namely until August 10, 1995. Like TBH, TSR has its own customers, but not the same organizational structure. It retained its separate legal status. It has its own tractors and employees and engages in provincial, interprovincial and international transportation. Among other things, it delivers gypsum for Canadian Gypsum. When the equipment required to make deliveries is not available, this work is entrusted to another subcontractor. Equipment maintenance (repair of tires,

maintenance of trucks and trailers, etc.) is subcontracted to another company, Thibodeau Transport.

Newcap's other corporate division, La Traverse Rivière-du-Loup, has always been engaged solely in providing a ferry service between Rivière-du-Loup and Saint-Siméon, in Quebec.

Clarke International, Sunac America and Clarke America, which are Newcap's other divisions engaged in transportation-related activities, were acquired recently. Clarke International operates on the same principle as the Rail Fast division, except that instead of providing rail transportation support, it specializes in overseas air transport. Like the Rail Fast division, this division operates as a pool car business. Its activities are based in Montréal and Toronto.

The Sunac America division, originally a forwarding company, was acquired by Newcap in February or March 1994. It co-ordinates the transportation of its clientele's goods by the various means available. Sunac America subcontracts all transportation activities to various businesses. This division's activities are based in Toronto. For its part, Clarke America is trying to develop north-south, as opposed to east-west, transportation.

Newcap also has other divisions in the printing and broadcasting sectors. However, no information was provided to the Board concerning these divisions since their activities are unrelated to the instant case.

Finally, Newcap's Clarke Transport Québec division is responsible for managing the human resources and labour relations of the divisions of the former Clarke Transport Group which are now headed by Newcap. Clarke Transport Québec essentially manages the various divisions. For all intents and purposes, it manages all support activities. It negotiates collective agreements, looks after insurance, manages the

personnel of the various divisions, serves as paymaster and plays a major role in the marketing of the company's various divisions and in the negotiation of the contracts that these divisions enter into with their respective customers. It is essentially a consulting firm. In fact, although most of Clarke/Newcap's divisions do not have a specific legal identity, each purchases the services offered by the other divisions, as required.

It is clear then that Clarke/Newcap's administrative and corporate divisions are not active partners in a national system, but rather profit centres that enjoy considerable autonomy. Although all divisions report to Newcap Inc., as they all used to report to Clark Transport Canada Inc., each has its own budget envelope and is responsible for its profits and losses. For accounting purposes, if one division requires the services of another, the former is billed for these services, as if it were a separate business. Similarly, each division is responsible for its sales and marketing. Although Clarke's trademark appears on purchase orders, distinctions are made for operational purposes between divisions in the case of transportation contracts and bills of lading, because billing is done by division, based on services rendered.

In the instant case, Clarke/Newcap therefore operates a business consisting of a number of components in that its administrative and corporate divisions operate in several markets: pool car and forwarding (shipping goods), specialized road transportation (cement, gypsum, petroleum, postal courier service) and maritime transportation (ferry service). From this perspective, if it can be said that Clarke/Newcap's purpose is transportation, it is nevertheless transportation in the broad sense of the term. Furthermore, no administrative division of the company is engaged in transportation nor employs any drivers.

A thorough examination of the evidence on file revealed, moreover, that the various components of this business are not sufficiently integrated or interdependent to make Clarke/Newcap an interprovincial transportation business. Leaving aside its corporate

structure, Clarke/Newcap's situation has much in common with that of the Paquette Group in Larose-Paquette Autobus Inc., *supra*. It is therefore appropriate to reproduce here the comments the Board made in that case in its determination of whether the employer's business was severable:

"To repeat the rule once more, one must examine the facts of the situation. If, leaving aside the corporate structures, one finds a single indivisible operation whose activities are integrated, it cannot be divided artificially so as to allow a part of it not to come under federal jurisdiction. However, it does not appear to us that the case law is asking us to turn a blind eye to clear and precise divisions between certain related operations and lump them all together under federal jurisdiction without first ensuring that each really is a federal undertaking (Northern Telecom Canada Limited et al. v. Communication Workers of Canada et al., [1983] 1 S.C.R. 733; (1983), 147 D.L.R. (3d) 1; and 83 CLLC 14,048 (Northern Telecom No. 2)).

Is the situation of the Group similar to that described in Winner, supra? No, except insofar as it too is engaged in bus transportation. Are all companies that make up the Group a single, integrated and indivisible undertaking, carrying on a regular federal activity -that of Paquette - thereby bringing them all under federal jurisdiction? (See Ottawa-Carleton Regional Transit Commission (1983), 51 di 173; and 83 CLLC 16.016 (CLRB no. 406) (OC Transpo), upheld by the Ontario Court of Appeal in Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279, et al. (1983), 44 O.R. (2d) 560; 4 D.L.R. (4th) 452; and 84 CLLC 14,006. See also Ferguson Bus Lines Ltd. v. Amalgamated Transit Union, Local 1374, [1990] 2 F.C. 586; 108 N.R. 2993; and (1990), 90 CLLC 14,015 (C.A.).) We do not believe so.

Paquette's present situation is totally different from that described in Winner or Alberta Government Telephones, supra. Generally speaking, what characterizes the companies belonging to the Group is clearly their transportation activities. These activities are varied and subdivide naturally into different specialized sectors that are distinct and different from one another and clearly autonomous in relation to each other. Finally, each sector constitutes in the instant case a corporate entity that is not merely an empty shell.

For example, charter transportation is exclusive to Paquette. This operation not only is divisible from the others, but also is in fact separated from them. ..."

(pages 122-123; and 148-149)

As in that case, the degree of integration of the structure of each division and the degree of co-operation and co-ordination that exists within Clark/Newcap are insufficient to support a finding that the undertaking here is one and the same. A close examination of Clarke/Newcap's divisions, be it its administrative divisions (TBH, Messageries Clarke, Distribution Clarke, Clark Transport (Rail Fast), Sunac America, Clarke International, Clarke America, Clarke Transport Québec) or the companies associated with it (La Traverse Rivière-du-Loup, TSR), reveals little interdependence and a high degree of autonomy.

On the other hand, the facts of this case are completely different from those where the Board found that the employer's business came under federal jurisdiction, even in the absence of a close functional link with an interprovincial business, because it was an integral part of an international network, and therefore had as its main purpose an interprovincial or international operational link requiring that it carry on its activities beyond the limits of a province on a regular and continuous basis. In those cases, unlike the situation in the instant case, the business in question was always found to be an *indivisible* federal undertaking (see in particular D.H.L. International Express Ltd. (1994), 96 di 106 (CLRB no. 1101); Emery Worldwide (1989), 79 di 71; and 7 CLRBR (2d) 49 (CLRB no. 768), upheld by the Federal Court of Appeal in Emery Worldwide, a CF Company v. Office and Technical Employees Union, Local 15, judgment rendered from the bench, no. A-604-89, October 16, 1990; and Brink's Canada Limited (1992), 87 di 65; and 16 CLRBR (2d) 132 (CLRB no. 918)).

In the instant case, only the TSR division engages in interprovincial transportation on a regular and continuous basis. Nevertheless, this division retained its separate legal

status and although this fact is not in itself determinative, it helps define the boundaries separating TSR's activities from those of the other divisions. In other words, *"each sector constitutes in the instant case a corporate entity that is not merely an empty shell"* (Larose-Paquette Autobus Inc., *supra*, pages 123; and 149). Furthermore, if this transportation activity comes under federal jurisdiction, it is also carried on independently and autonomously, unlike the case in J.C. Fibers Inc., *supra*, where the Board concluded that the provincial transportation activity carried on by the employer was highly integrated with its interprovincial transportation activity, with the result that these activities *"could not be severed or described in terms of the ownership of the goods transported, the assignment of employees to this activity or the use of special equipment"* (page 7).

There are, of course, certain links between TBH and TSR, and the latter, as we pointed out, is a Clarke/Newcap division engaged in interprovincial activities. However, in our opinion, the nature and scope of these links are not such as they would make TSR an active partner in a national system, or create a national system when the components of such a system never existed in the first place. The ties between TBH and TSR are similar in nature to those that may link all independent companies that choose to do business together. Admittedly, TBH in most cases uses TSR's services to perform the Canadian Gypsum contract when interprovincial transportation is required. However, TSR does not have a monopoly in this regard. The services of other interprovincial transportation businesses can also be used. Moreover, when TBH uses TSR's services, it bills that division for services rendered, just as any other independent undertaking would. Finally, the relationship between TBH and TSR is not reciprocal: TSR does not use TBH's services to carry on its activities. Therefore, the Board cannot conclude that the two companies maintain close operational ties or that TSR is dependent on TBH's activities.

As regards Messageries Clarke, although this division can probably be termed a federal undertaking because of its close ties with its main customer, CPC, this

description has no impact as such on the constitutional characterization of the other components of the business. This determination is based not on the nature of Messageries Clarke's transportation activities, which are clearly local, but on the nature of the services this division provides to CPC, these services being essential to the operation of the postal service (see by analogy Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al., [1975] 1 S.C.R. 178; and Canada Post Corporation v. Canadian Union of Postal Workers et al., judgment rendered from the bench, no. A-762-87, January 28, 1988 (F.C.A.), where the Court held that a retail postal outlet operated by a pharmacy came under federal jurisdiction because its activities were an integral part of the operation of the postal service, despite the fact that the core undertaking was essentially provincial since its activities were purely local). The federal nature of this division therefore results from its connection with a core federal undertaking and not from the nature of its transportation activities. Thus, Messageries Clarke's federal status would not in itself suffice to bring within federal jurisdiction the other components of the business, assuming that their respective activities are integrated or co-ordinated, an assumption that is not supported by the facts.

In AGT, supra, the Supreme Court of Canada stated that *"ownership itself is not conclusive"* (page 265) and does not *"take away from the degree of integration which exists between the member system and the level of cooperation and coordination which exists in [a national system]."* In our opinion, this principle also has a reverse application, to the extent that, as the Privy Council pointed out in Winner, supra, the interprovincial transportation undertaking in question is operated separately from and independently of the others components of the business, which includes a purely local transportation component.

Nowadays, it is common practice for a single company to have several divisions, and the fact that each division does not have a separate legal status in no way alters the fact that it can be operated separately from and independently of the other divisions

and identified separately for its customers. A single corporate structure may head several undertakings without necessarily constituting an integrated and coordinated national system.

This is precisely the case here. An examination of the situation reveals that Clarke/Newcap is in fact a company consisting of a number of undertakings that are operated separately by its various divisions. The evidence on file does not support a finding that there was any real integration of these undertakings into a single entity, and that there was sufficient co-ordination between or interdependence of said undertakings at a functional and operational level. A examination of the purpose and activities of these divisions confirms this finding because, although these activities all relate directly or indirectly to transportation, they have little or no connection with one another. Depending on the case, the degree of operational integration of the components is either limited or largely non-existent. In fact, each Clarke Newcap division is sufficiently autonomous to be severable without significantly altering the fundamental nature of its business.

Moreover, Clarke/Newcap does not own any tractors or employ any drivers; it entrusts the performance of the provincial transportation component of its operations to independent subcontractors. The interprovincial transportation component of the company continues to be operated by TSR, which has a separate legal status. This fact, although not in itself determinative, helps demonstrate even more clearly the lack of integration between this component of the business and the provincial activities of the parent company.

In Quebec, Newcap's Clarke Transport Québec division provides all divisions with human resources services, under legal and physical arrangements that are characterized by genuine co-operation. Through the vice-president of human resources, Mr. Serge Leclerc, this division unquestionably exerts an influence, indeed even a control on the negotiation of contracts and the financial orientation of

Newcap's divisions engaged in transportation in Quebec. Notably, it was Mr. Leclerc himself who headed the negotiations to obtain the gypsum contract held by Provost.

However, in our view, these common management elements do not enable us to conclude that there is genuine operational integration. Like the role played by St-Eustache in Larose-Paquette Autobus Inc., *supra*, the Clarke Transport Québec division "*performs administrative tasks that are often performed by service enterprises serving small businesses*" (pages 120; and 146). The role played by the Clarke Transport Québec division therefore does not affect the finding that Clarke/Newcap essentially consists of a group of interested parties that have no real common operational structure.

Moreover, even if Clarke had obtained authorities to operate an interprovincial trucking business, at all the relevant times in the instant case Clarke/Newcap never operated these authorities, nor had any administrative division engaged in interprovincial trucking activities.

Thus, the creation of Newcap Inc. and the dissolution of Clarke Transport Canada Inc. did not change the situation that existed previously in the area of transportation. Newcap is still in the transportation business, providing pool car and forwarding services (Clarke Transport (Rail Fast), Clarke International, Sunac America, Clarke America), bulk transportation of cement, gypsum and liquids (TBH locally and TSR interprovincially), a ferry service (la Traverse Rivière-du-Loup) and a local postal courier service (Messageries Clarke, Distribution Clarke), and the purpose and method of operation of these various divisions have not been altered significantly.

Therefore, we cannot conclude that Clarke/Newcap's primary purpose is the operation of an indivisible interprovincial transportation business. In practice, the various activities of this company's divisions are not sufficiently integrated or dependent on one another to be able conclude that their interdependence is such as to make Clarke/

Newcap a federal undertaking. The evidence showed that Clarke/Newcap provides services under legal and physical arrangements that, on the whole, are characterized by limited co-operation and that the level of integration of these services is insufficient to make the business indivisible, within the meaning of the existing case law on the question of constitutional characterization. Newcap, like Clarke, does not therefore form a coherent whole having a single purpose, but rather consists of a group of undertakings that have only limited ties with one another and whose purpose is essentially provincial.

With regard to Clarke/Newcap viewed on its own, we can add that if Clarke was clearly a separate business in itself from a constitutional standpoint and came under provincial jurisdiction when the instant application was filed (its activities were limited to pool car operations and trucking in Newfoundland), the same cannot be said of Newcap, which ceased to be anything more than the sum of its parts following the corporate and administrative reorganization. The activities that Clarke carried on were entrusted to a division created for this purpose. This division has the same status and administrative autonomy as Newcap's other divisions. Consequently, it is now even more difficult to consider Newcap, viewed on its own, as anything more than the sum of its parts, because in this context, the business must be viewed in its entirety as a "going concern" (Northern Telecom, *supra*, page 132; for an analysis of the notion of business/undertaking, see also Larose-Paquette Autobus Inc., *supra*, pages 118-119; and 144).

In short, while it is true that Clarke/Newcap consists of a group of divisions engaged in transportation, the fact remains, as the Board concluded in Larose-Paquette Autobus Inc., *supra*, that:

"... for the purposes of determining its constitutional status, this group subdivides naturally into various sectors. The activities of Paquette within the Group form a distinct, divisible and separate entity, as a going concern. ..."

The evidence persuades us that the various components and sectors that make up the Group are sufficiently distinct so as not to be confused constitutionally. The companies that make up the Group are in fact divisible constitutionally because they correspond to separate 'sectors of activity,' within the meaning of section 2 of the Code, under either federal or provincial jurisdiction. Above all, these sectors each constitute a business, a going concern, for the purposes of determining their constitutional status."

(pages 124; and 149-150)

V

Decision

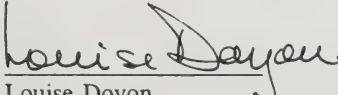
Because the gypsum contract was transferred to Clarke's TBH division, and is still being performed by Newcap's TBH division, and because the Board has concluded that the business in the instant case is divisible from a constitutional standpoint, we must now determine whether this division comes under federal or provincial jurisdiction.

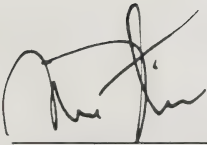
The preceding analysis established that TBH does not engage in interprovincial activities and is not essential to a core federal undertaking. TBH's regular and habitual activities as a going concern reveal that its role is purely local. Its activities are limited to transporting cement, petroleum and gypsum within the province of Quebec, more specifically, in the James Bay region. If interprovincial transportation is required to perform the Canadian Gypsum contract, which is seldom the case, this work is subcontracted to another business. Clearly, TBH does not come under federal jurisdiction owing to the nature of its normal and habitual activities.


To come under federal jurisdiction then, Clarke/Newcap's TBH division would have to be a subsidiary business that is vital to a core federal undertaking. The evidence in no way supports such a finding, whether the situation is viewed from the standpoint

of TBH's customers or from that of the Clarke/Newcap business. Clarke/Newcap, we will recall, is not in itself a federal undertaking.

For these reasons, the Board finds that Clarke/Newcap's TBH division, the undertaking in question in the instant case, does not come under federal jurisdiction. Consequently, the Board allows the employer's objection and declares that it lacks jurisdiction to hear the application filed by the union. The application filed pursuant to section 44 of the Code is therefore dismissed.


Louise Doyon
Vice-Chair


François Bastien
Member


Véronique L. Marleau
Member

information

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Summary

Eugene Kalwa, *complainant*, and Ontario Hydro *respondents*, and The Society of Ontario Hydro, Professional and Administrative Employees, *interested party*.

Board Files: 745-4750
745-4849
745-4955
745-5097

CLRB/CCRT Decision no. 1130
July 13, 1995

Résumé

Eugene Kalwa, *plaignant*, ainsi que Ontario Hydro, *intimées* ainsi que Société des employés professionnels et administratifs de l'Hydro-Ontario, *partie intéressée*.

Dossiers du Conseil: 745-4750
745-4849
745-4955
745-5097

CLRB/CCRT Décision n° 1130
le 13 juillet 1995



The complainant had filed several complaints pursuant to the Canada Labour Code against Hydro-Ontario, the respondent employer. The respondent sought to have the complaints consolidated, alleging similarity amongst them. The complainant objected to consolidation because he had additional submissions to make.

Le plaignant avait déposé plusieurs plaintes en vertu du Code canadien du travail à l'égard d'Hydro Ontario, l'employeur intimé. Celui-ci demandait que les plaintes soient regroupées, puisqu'elles étaient à son avis analogues. Le plaignant, pour sa part, ne voulait pas que les plaintes soient regroupées, puisqu'il désirait présenter de nouvelles observations.

The Board ruled orally to consolidate the complaints, noting that since the respondent carried the onus, the complainant would hear its evidence and would have an opportunity to prepare a reply.

Le Conseil a rendu à l'audience sa décision de regrouper les plaintes. Il a fait remarquer que le plaignant aurait l'occasion d'entendre les arguments de l'intimé, et de présenter ses propres observations supplémentaires, puisque la charge de la preuve incomberait à l'employeur intimé.

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After that ruling, the Board heard preliminary objections raised by the respondent, principally that the complaints should more properly be arbitrated and that the Board should refuse jurisdiction pursuant to section 98(3) of the Code. The parties to the collective agreement, the respondent and the interested party, had consented to the jurisdiction of an arbitrator to hear and determine the complaints as grievances, as if they had been filed under the collective agreement. The arbitrator had advised the complainant, the trade union and the employer that he had the full jurisdiction of an arbitrator under the Code to provide a final, binding and enforceable resolution to the grievances.

The Board was satisfied, by virtue of that agreement and the specific submissions of the parties, that all of the issues in the complaints before the Board were also before the arbitrator. Issues such as these that are essentially questions of fact are more appropriately determined by arbitration, and a wide range of remedies is available to an arbitrator.

Accordingly, the Board deferred the complaints to the existing arbitral process, and exercised its discretion under section 98(3) of the Code to refuse to hear and determine these complaints.

Après avoir rendu cette décision, le Conseil entendu les objections préliminaires de l'employeur. Celui-ci prétendait surtout que les plaintes devaient être tranchées par l'arbitre et que le Conseil devait refuser de l'instruire aux termes du paragraphe 98(3) du Code. Les parties à la convention collective, l'employeur intimé et la partie intéressée convenaient tous que ces plaintes pouvaient être soumises à un arbitre qui les instruirait et les trancherait au même titre que des griefs déposés en vertu de la convention collective. L'arbitre avait avisé le plaignant, le syndicat et l'employeur qu'il avait pleinement compétence en vertu du Code pour rendre dans cette affaire une décision finale qui aurait force exécutoire et qui lierait toutes les parties.

Cet accord, ainsi que les observations des parties, ont convaincu le Conseil que toutes les questions dont il avait été saisi se trouvaient aussi devant l'arbitre. Ce type de questions, soit les questions d'ordre purement factuel, ressort plus adéquatement de l'arbitrage, et l'arbitre dispose d'une vaste gamme de redressements.

Le Conseil s'en remet donc au processus d'arbitrage en cours et exerce les pouvoirs discrétionnaires que lui confère le paragraphe 98(3) pour refuser d'instruire et de trancher ces plaintes.

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Reasons for decision

Eugene Kalwa,

complainant,

and

Ontario Hydro,

respondent,

and

The Society of Ontario Hydro Professional and
Administrative Employees,

interested party.

Board File: 745-4750/4849/4955/5097

CLRB/CCRT Decision no. 1130

July 13, 1995

The Board was composed of Mr. J.F.W. Weatherill, Chairman and Messrs. Calvin B. Davis and Michael Eayrs, Members. A hearing was held on June 27, 28 and 29, 1995, in Toronto.

Appearances

Dr. Eugene Kalwa, on his own behalf;

Mr. David Akande, and Mr. David Mombourquette, co-counsel for the employer; and

Mr. Jeff Berg, Staff Officer for the Society.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

A panel of the Board comprised of J.F.W. Weatherill, Chairman and Messrs. Calvin B. Davis and Michael Eayrs, Members considered the representations of the parties

at the outset of the hearing with respect to the consolidation of all of Dr. Kalwa's complaints against the employer. The Board made the following ruling, delivered orally at the hearing.

"There are before the Board a number of complaints of unfair labour practice brought by the complainant against the respondent Ontario Hydro. It would appear that in these complaints the complainant is supported by his bargaining agent, the Society, which is an interested party to these proceedings, although the complainant appears, as he is of course entitled to do, on his own behalf. Since the notice of the present hearings - which notice covered a number of complaints filed by the complainant - was given, a further complaint, similar in nature to others although arising out of separate circumstances, has been filed. The respondent seeks to have all these complaints consolidated, and in support of that motion refers to the similarity of the complaints, the overlap of evidence, the identity of the parties, the desirability of expedition, the balance of convenience and the lack of any prejudice.

It is true that the parties to the several complaints are the same, that the questions raised by the complaints are generally similar in nature and that much of the evidence which would be presented in any one of them would be the same as much of the evidence in the others. The consolidation of the cases would clearly be a more convenient, less expensive and, it is to be hoped, more expeditious procedure than to hear each case separately, and it should be remembered that all the complaints except the most recent one have already been set down - without objection - to be heard together.

The basis for the complainant's objection to consolidation is that he has further submissions to make to the Board, in response to submissions filed by the respondent and by the trade union. Consolidation of the complaints would not, however, prejudice the complainant's presentation of his case for the following reasons: these matters are proceeding to public hearing, and the onus in cases of this sort is on the respondent to proceed first and to establish its case. The complainant, that is, has the advantage of the reverse-onus provisions of the Code, and will have the opportunity to hear the responses to which he refers, as part of the case which the respondent will have to put in. If, indeed the respondent were taken by surprise by any of the evidence advanced,

he would, if the circumstances so required, be entitled to time to prepare a reply thereto.

We are of the view, therefore, that the balance of convenience and the interests of justice and of the expedition of the hearing of this matter are best served by the consolidation of these complaints, and that such consolidation is in no significant way prejudicial to the interests of the complainant. Accordingly, the several files are consolidated."

II

Following this ruling, the Board heard argument on certain preliminary objections which had been raised by the respondent. The principal one of these, and the only one on which the Board found it necessary to make a ruling, was the request by the respondent, supported by the trade union, that the Board refuse to hear and determine these complaints, which, according to the respondent, should be referred to arbitration. This request was based on section 98(3) of the Canada Labour Code, which provides as follows:

"(3) The Board may refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."

The Board considered the representations of the parties and made the following ruling.

"The Board has considered the representations of the parties made at the hearings on February 8 and June 27, 1995. When this matter was set down for hearing on the merits, by notice dated May 26 1995, the Board made no disposition of the preliminary questions which had then been argued. Since that time, the parties to collective bargaining, the employer Ontario Hydro and the trade union the Society, have entered into arrangements to arbitrate the substantial questions raised by the complainant in the complaints against the employer which are before the Board. In the case of the most recent complaint, which the Board has consolidated with the others already before it, that complaint would be the proper subject

of a grievance pursuant to the collective agreement which has been entered into by the parties to collective bargaining, the employer and the trade union. The complainant, of course, is a member of the bargaining unit of employees of the employer for which the trade union is the exclusive bargaining agent.

The parties to the collective agreement have, as well, agreed that the other complaints filed by the complainant with this Board, and which would properly have been the subject of grievances under a collective agreement had one existed at the time they were filed, are to be arbitrated. Those parties have consented to the jurisdiction of the arbitrator to hear and determine those grievances "as if they had been filed under the current collective agreement" (as the arbitrator has stated), and the arbitrator has advised the complainant, the trade union and the employer that he is satisfied he has the full jurisdiction of an arbitrator under the Canada Labour Code "to provide a final, binding and enforceable resolution of all the grievances" referred to him by the parties. The basic source of this jurisdiction is the collective agreement, and we are satisfied that, by virtue of that agreement and the specific submissions of the parties, all of the questions put in issue in the complaints now before this Board are also before the arbitrator.

In our view, questions of this sort are appropriately determined by arbitration and the Board has, on a number of occasions deferred their determination to arbitration. We consider that this is an appropriate course to follow in this case especially where, as here, the learned arbitrator has advised that he accepts jurisdiction and where a number of dates have been set for hearings and procedures implemented to facilitate and expedite the presentation of evidence at the hearings. The interests of all parties and in particular of the complainant are, in our view, best served through the arbitral process.

It is not necessary for us to make any ruling on the employer's argument that the complaints do not set out a prima facie case, nor on the objection that some of the complaints may not be timely. Any such questions are matters on which, if the objections are pressed, the arbitrator may rule.

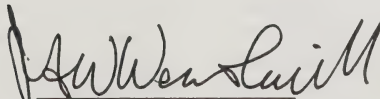
For the reasons we have given, it is our opinion that the issues raised in the complaints filed against the employer may be properly and totally addressed in arbitration, to use the language of the Board in Canadian Broadcasting Corporation (1990), 83 di 102; and 91 CLLC 16,007 (CLRB no. 839). It is worthy of note that the arbitration process to which the parties have agreed gives the

complainant the benefit of arbitration over questions which, as the Board ruled in Eugene Kalwa (1995), as yet unreported CLRB decision no. 1106, would not be the subject of determination by us (in a case relating to the union's duty of fair representation).

The arbitral process is the most natural and desirable forum for the determination of questions such as those before us. They are essentially questions of fact, and a wide range of remedies is available to the arbitrator in the event of findings in favour of the complainant. The Board notes as well the undertaking of the trade union that its presentation on behalf of the complainant will be made by counsel different from counsel who appeared in opposition to the complainant in the section 37 claims against the union which were previously before the Board.

Accordingly, the Board defers these questions to the existing arbitral process, and exercises its discretion under section 98(3) of the Code to refuse to hear and determine these complaints."

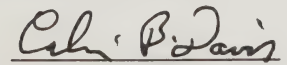
We now confirm that ruling. Of course, the allegations of discrimination which the complainant has made in the instant cases are (subject to any timeliness or other pertinent objections), properly before us, but the same questions may be, and in fact are, properly before an arbitrator, generally as "just cause" questions. The Board exercises its discretion under s.98(3) of the Code.



J.F.W. Weatherill
Chairman



Michael Eayrs
Member



Calvin B. Davis
Member

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Summary

Antonia Di Palma, *employee*, and
Air Canada, *employer*.

Board File: 950-297
CLRB/CCRT Decision no. 1131
July 14, 1995



Referral of a safety officer's decision pursuant
to section 129(5) of the Canada Labour Code,
Part II.

Safety of employees - Referral of safety
officer's report - A flight attendant refused to
work during a flight because she believed that
the airflow in the aircraft was insufficient and
that as a result the environment was dangerous
to her health.

The Board confirmed the safety officer's
decision of absence of danger. The Board
reviewed the notion of danger contemplated in
the Code and reaffirmed that the right to
refuse is designed to be used in situations
where employees are faced with a danger that
is both immediate and real; and not to bring
existing disputes to a head or to accelerate the
resolution of ongoing problems.

Résumé

Antonia Di Palma, *employée*, et Air Canada,
employeur.

Dossier du Conseil: 950-297
CLRB/CCRT Décision n° 1131
le 14 juillet 1995

Renvoi de la décision d'un agent de sécurité
conformément au paragraphe 129(5) du Code
canadien du travail, Partie II.

Sécurité du personnel - Renvoi du rapport
d'un agent de sécurité - Un agent de bord a
refusé de travailler au cours d'un vol parce
qu'elle croyait que l'écoulement d'air dans
l'avion était insuffisant et qu'en conséquence,
son environnement de travail était dangereux
pour sa santé.

Le Conseil a confirmé la décision d'absence
de danger de l'agent de sécurité. Le Conseil a
réexaminé la notion de danger envisagée dans
le Code et a réaffirmé que le droit de refuser
de travailler est censé être invoqué dans les
situations où les employés font face à un
danger immédiat et réel et non pour faire
aboutir les conflits de longue date ou accélérer
le règlement de problèmes de nature continue.

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Reasons for decision

Antonia Di Palma,

employee,

and

Air Canada,

employer.

Board File: 950-297

CLRB/CCRT Decision no. 1131

July 14, 1995

The Board was composed of Ms. Véronique L. Marleau, Member, sitting as a single member panel pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health). A hearing was held on March 21, 29, 30, May 23 and 24, 1995, at Montréal.

Appearances

Mr. Anthony Pizzino, Senior Officer, Health and Safety Department, CUPE, assisted by Ms. France Pelletier, Director, Health and Safety Committee, CUPE, for the employee; and

Ms. Louise-Hélène Sénécal, Counsel, assisted by Mr. Claude Charland, Manager Customer Service - In Flight Safety Training Standards, for the employer.

I

These reasons deal with a referral of a safety officer's decision to the Board under section 129(5) of the Canada Labour Code:

"129. (5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or

that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."

The referral arose from Ms. Antonia Di Palma's refusal to work on September 9, 1994 and the safety officer's subsequent finding of absence of danger on December 8, 1994. The Board received the reference on December 30, 1994 and heard the parties as soon as available dates were found.

II

Ms. Di Palma, an employee of Air Canada, has been working as a flight attendant for 24 years. She told the Board that on September 9, 1994, on a Toronto-Montréal flight, the last leg of a four-day cycle, she started to have a headache about 30 minutes before landing. She felt that there was a lack of air in the aircraft and asked Captain Smith, the chief pilot, to increase the airflow. The air pack was at the normal setting. He refused, explaining that the setting of the airflow was determined by the Aircraft Operating Manual. He said that everything was normal (all the instruments showed normal air circulation) and asked her how the other flight attendants were feeling. She replied that she did not know. He asked her if she needed a doctor. No, she said, what she needed was more air. This was at a time when the flight crew were rushing to finish the service. She continued to work and then started to feel a pressure in her chest and to feel light headed. At this point the aircraft had started its descent. She felt dizzy and bent her head. She then told Mr. Roger Marcil, the purser, that she was sick. He gave her oxygen. As she was breathing through the mask, she told Mr. Marcil that she believed that the environment was dangerous to her health and asked him to tell the captain that she was refusing to work for the remainder of the

flight. Roger Marcil left and when he came back, she asked him what he had told to the captain. He replied that he had said that she was refusing to work.

Believing that Ms. Di Palma was feeling sick, Captain Smith arranged for medical assistance upon arrival. He did not treat Ms. Di Palma's action as a refusal to work and, as a result, the procedure for work refusals on aircraft that are in operation was not followed and no investigation by the employer pursuant to section 128(7) was undertaken upon arrival.

Mr. Léonard Lafleur, Manager-Customer Services for Air Canada, and Mr. Luc Bergeron, Ms. Di Palma's supervisor and also a manager at Air Canada and Co-Chairperson of the Occupational Health and Safety Committee ("OH&S Committee"), were nevertheless present upon arrival, along with a medical team and an ambulance. As Ms. Di Palma was coming out of the aircraft, she was asked whether she needed an ambulance. She said she did not. She then went to sit with Messrs. Bergeron and Lafleur in a quiet area. They asked her what had happened. She said that the captain had refused to increase the airflow. She had had previous discussions with Mr. Bergeron about this. She completed an injury report, the details of which she provided later. She did not say to either of them that she had exercised her right to refuse to work because, as she told the Board, she took it for granted that they knew. They told her to take her time, offered her a taxi, and Mr. Bergeron accompanied her home in the taxi.

Upon arriving home, Ms. Di Palma called Mr. Reynoud Wijtman, the union's Co-Chairperson of the OS&H Committee, and Ms. France Pelletier, Chairperson of CUPE's Health and Safety Committee. She told them that she had refused to work because she felt sick, that she had asked the captain to increase the airflow and that her request had been denied. She asked for help in the matter.

Mr. Wijtman then called Mr. Luc Bergeron, his counterpart at the company. They met later on in the afternoon. They disagreed on the question of whether there had been a refusal to work. In Mr. Bergeron's view, there was nothing in the nature of a refusal. It was a simple case of someone who was sick during a flight. Mr. Wijtman disagreed.

In the meantime, Ms. Pelletier called Transport Canada. She left an urgent message to Mr. Pierre Doucet, the Aviation Safety Officer in charge. Because it was the weekend, she did not get a response until Monday morning.

Although Ms. Di Palma's condition that day as well as the events surrounding her refusal are not in dispute, the employer took a long time to recognize her action as a refusal to work during the flight. Because of this, no investigation was undertaken by the employer and, as a result, the provisions of the Code were not followed until much later.

On September 15, 1994, by facsimile, Mr. Wijtman sent Mr. Doucet some documents with a view to having Transport Canada investigate the matter. The package included, among others, company memoranda which reflected the conflicting versions with respect to the work refusal, and Ms. Di Palma's "Addendum to injury report filed September 9th, 1994." One memorandum, dated September 9, 1994, from Mr. Bergeron to Mr. Claude Charland, Manager Customer Service - In Flight Safety training Standards for Air Canada, reads in part:

"STOC in YUL received a call from flt 122-09 Sept. '94 requesting for an ambulance due to sick flight crew.

Aircraft arrived at the gate and we were made aware that F/A Antonia Di Palma had felt faint during descent. She requested to the captain to have the air pack placed on high and was refused due to all instruments showed normal air circulation. This was at a time during flight when the flight crew were rusing to finish the service,

pick-up, light turbulence. F/A had to take some O2 and felt a bit better. She mentioned that she never, nor did the In-Charge request for medical assistance upon arrival. The only thing she wanted was more air, but Captain Smith was under the impression that she was sick and called for medical assistance due to the rest of the crew feeling ok.

There was an article in Info-Cabin last year Vol.5, Issue 19 dated May 12'93 that was entitled EMPLOYEE SAFETY - A BREATH OF FRESH AIR. This article mentioned

'On occasion, Cabin Personnel have made requests to the flight deck for additional air flow due to Customers or crew members feeling faint or having difficulty breathing. Should the need arise to increase the flow to a more comfortable level..... all captains have been instructed to increase the air flow once a request has been made.'

This was not the case on this flight and after speaking with Captain Smith it seems that they do not have such instruction. This is not in their manual and have no indication of this bulletin.

This is the second incident of this nature reported but the other incident was that the whole crew felt faint and the captain agreed to turn the air pack on high and the crew felt much better. I/C A.Benoit #06312.

We are getting more and more of these incidents and a clear guideline has to be set-up and followed by all.

Please advise. "

Also included in the package was a copy of a letter sent to Mr. Charland by the OH&S Committee, following the September 9, 1994 incident, which outlines the union's position concerning actions to be taken with respect to airflow in aircraft. That letter states in part:

"... The problem is not the 'quality of air' but rather the 'quantity required'. As we all know, with the number of flight crew onboard our flights and the quantity of work required by each, there are

times when the normal air flow is not enough to keep everyone working in a healthy environment, this due to the high energy required to complete their duties.

The Flight Deck crew cannot assess the air condition of the cabin just by looking at their instruments. Human factor is a key element to these requirements.

When the flight deck is asked to turn up the flow, there should not be any questions asked. This request was refused by the Captain on flt 122, Sep. 09'94 and the Flight Attendant had to take O2 from the portable bottle to recover. Other incidents reported of this nature when the flow was turned-up resulted in the crew feeling better and continued their duties without any discomfort.

The Health and Safety Committee in Montreal has been addressing this issue for over a year and cannot be ignored any longer. Also with the imminent introduction of the A319 aircraft into our fleet, this issue has to be dealt with and immediate rectification is to be made to the operational instructions of Flight Ops.

CUPE Health & Safety position is that the air flow setting be left on high at all times. Management part of the Health & Safety committee demands that Flight Ops. be made aware that when a request for more O2 is made, the air flow setting should be raised without questioning as was originally published in Info-Cabin, Vol.5, Issue 19, May 12'93. Also, a bulletin must be issued to all front-end crew to be placed in their Operation Manual.

Please forward this request to all interested party for immediate action. Would appreciate a prompt reply.

Sincerely,

*Luc Bergeron
Co-Chairperson - Customer Service
In-Charge Manager - East*

*Reynoud Wijtman
Co-Chairperson
CUPE Safety "*

Mr. Wijtman called Mr. Doucet shortly thereafter and a meeting was scheduled for September 26, 1994. At that meeting, the union's health and safety representatives,

Mr. Wijtman and Ms. Pelletier, met with Transport Canada's representatives, Messrs. Doucet and Tamboriello. Mr. Tamboriello, a safety officer, had been assigned to the file by Mr. Doucet. The purpose of the meeting was to discuss the work refusal and the company's refusal to recognize it as such, as well as the problem of air quality in aircraft. Ms. Di Palma was subsequently informed of the meeting and was told by Mr. Wijtman that Transport Canada had undertaken an investigation. Mr. Wijtman also informed Air Canada's Mr. Bergeron of that meeting.

Whether an investigation was initiated at this point still remains unclear. Mr. Tamboriello told the Board that since the employer had not carried out an investigation of the refusal pursuant to the Code, Transport Canada's intervention at that stage was not "official," but rather done in an advisory capacity. In this regard, Mr. Tamboriello stated that it was not up to them to force the parties to follow the steps provided for in the Code when a work refusal takes place, but that these steps had to be followed before they could intervene.

On September 29, 1994, the company issued a new Technical Bulletin which was immediately brought to the pilots' attention via the computer system and incorporated shortly thereafter in the company's Aircraft Operating Manual, thus making it a compulsory procedure. That Bulletin was aimed at rectifying the situation that had triggered Ms. Di Palma's refusal to work. It stated that pilots now had to select the HIGH setting any time a crew member requested it. The procedure already in existence since May 12, 1993, but which had been until then left to the pilot's discretion, was now rendered mandatory.

Ms. Di Palma, who in the meantime had resumed her regular duties as flight attendant and continued to work her normal flight cycle, was informed of the implementation of Technical Bulletin. She considered this solution unsatisfactory and requested time to think about it. She then decided to continue to refuse to work pursuant to the Code and informed the employer of her decision. In Ms. Di Palma's opinion, the only

adequate solution would be to leave the air flow on HIGH at all times, since there should be no need to have to ask the chief pilot for more air.

On November 2, 1994, Mr. Wijtman found a copy of the minutes of a meeting between the company and Transport Canada. He had not heard from Transport Canada since the September 26 meeting. As it turns out, Transport Canada had met privately with the employer on October 14, 1994. Air Canada had called the meeting to discuss two safety issues, including Ms. Di Palma's work refusal. According to the minutes, Mr. Bergeron provided Mr. Tamboriello with a chronological description of the September 9 events, and informed him of the action taken by the company to resolve the matter, namely, the changes brought to the procedure governing the use of air packs on board A320 aircraft. Here again, according to Mr. Tamboriello, this was not considered by Transport Canada as part of the safety officer's investigation since at that point their investigation was conducted on a strictly voluntary basis because the procedure under the Code had not been followed. They were not intervening pursuant to the Code, they were just trying to help resolve the matter.

This was obviously not fully understood by the parties since immediately thereafter, Mr. Wijtman wrote to Mr. Doucet of Transport Canada indicating that they were not recognizing these minutes *"as being the final decision rendered by Transport Canada."* It is also worthy of note that the letter ended with the following request: *"Please forward your decision to Ms. Di Palma at her home and likewise to mine at your earliest convenience by registered mail."*

If Transport Canada's role up to that point was strictly "advisory," the response given to Mr. Wijtman's request certainly did not help clarify this. That response is contained in a letter from Mr. Tamboriello to Ms. Di Palma dated November 9, 1994, with copies to Messrs. Wijtman and Charland:

"SUBJECT: REFUSAL TO WORK - SEPTEMBER 9, 1994"

Ms. Di Palma,

This is to inform you of our decision following the investigation regarding the subject matter.

Mr. Luc Bergeron informed us that Air Canada has issued a Technical Bulletin concerning the operation of the Air Packs on the A-320 aircraft (copy enclosed). This bulletin will be incorporated into the Flight Operations Manual, thus becoming a compulsory procedure, giving no choice to the pilots but to comply with it.

Since this solution is in line with your expectations, as expressed in your letter of September 26, 1994, (copy enclosed), addressed to the Safety & Health Committee, we feel that for the time being no further action is required by us in this matter.

Hoping this to be at your entire satisfaction, we remain ..."

(emphasis added)

Regarding the nature and content of this letter, Mr. Tamboriello told the Board that despite its appearance, this letter was not a safety officer's decision. The word "investigation" was misleading because the procedure under the Code had not been followed.

Ms. Di Palma and the union's health and safety representatives were dissatisfied with that ruling since it did not contemplate Ms. Di Palma's proposed solution that the air pack be put on HIGH "on all aircrafts, at all times." This led to a meeting with Messrs. Tamboriello and Doucet on November 16, 1994. At that meeting, Mr. Tamboriello again informed Ms. Di Palma and the union representatives that the procedure under the Code had not been followed and that, therefore, Transport Canada could not be involved.

According to Mr. Tamboriello, proper notification of the continuance of the refusal to work was only received from Air Canada on November 18, 1994, advising that Ms. Di Palma was not accepting the technical bulletin and that she would continue to

refuse to work, and from Ms. Di Palma on November 24, 1994. Thus, as he considers it, his actual intervention pursuant to the Code only started on November 24, 1994.

The parties met with the safety officer for the purposes of the investigation on November 24 and 29, 1994. They submitted the documentation deemed relevant for that purpose.

As part of his investigation, the safety officer verified the aircraft journey log book from August 1 to October 21, 1994 *"and found no significant snags with regard to the air conditioning system."* He checked all the snags up to December 1, 1994, as reported by Air Canada in its computerized record, and again found nothing significant. Mr. Tamboriello also *"checked the snags concerning the air conditioning system only, for the entire Air Canada A320 fleet, from August 1, 1994 to December 1, 1994"* and *"nothing in particular was observed."*

He noted from having spoken to Ms. Chantal Boily, Engineer, Airframe Systems, that Air Canada had decided to replace the air conditioning filters more frequently than recommended by the manufacturer and that better quality filters would be used in the immediate future. He stated that these changes would improve the overall air quality on board the A320 aircraft.

Mr. Tamboriello also reported having checked the defects as entered by the flight attendant in charge upon termination of each flight, from August 1, 1994 to November 11, 1994, and stated having discovered nothing relevant.

He questioned Mr. Roger Marcil, the flight attendant in charge, on the conditions of Flight 122 on September 9, 1994. Based on his conversation with Mr. Marcil and on Ms. Di Palma's report, the safety officer concluded that no abnormalities were

observed throughout the whole flight, except for the fact that Ms. Di Palma was not feeling well and was given oxygen.

Mr. Tamboriello also took note of the new procedure implemented after Ms. Di Palma's refusal, which has since then become mandatory. He noted that the "Air Packs" flow selector provided for three possible selections, LOW, NORMAL and HIGH, and that the LOW or NORMAL setting is used under normal operating conditions, depending on the passenger load, while the HIGH setting is to be used for abnormally hot and humid conditions, for short periods of time only, *"since the system is not designed to be used on HIGH continuously."*

To determine whether the air quality on board the aircraft involved met the applicable standards, Mr. Tamboriello relied on an air quality study on A320 aircraft. That study was conducted by Airbus Industries at Air Canada, in the presence of an Air Canada engineer, Ms. Chantale Boily, and a union representative, Mr. Reynoud Wijtman some six months prior to Ms. Di Palma's refusal. Several flights were carried out from June 20 to 23, 1994, during which a series of cabin air quality measurements were taken. However, none of those flights involved the aircraft affected here. Based on the results of that study, Mr. Tamboriello concluded that:

"- Carbon Monoxide (CO) levels are less than 2ppm; the Threshold Limit Value - Time Weighted Average (TLV-TWA), as set by the ACGIH is 50ppm;

- Ozone levels are less than 0.05ppm; the TLV-TWA by ACGIH is 0.1ppm;

- Carbone Dioxide (CO2) levels were measured at four different sections, (aircraft diagram enclosed for reference) with the following readings:

- Sections 2, 4 and 8: 800-2300ppm;

- Aft galley: 5200-9000ppm;

The TLV-TWA by ACGIH is 5000ppm, averaged out over eight hours. It should be noted that the above are spot readings and are not averaged out over eight hours. If the aft galley readings were averaged out over eight hours, they would probably be below 5000ppm. However, these figures exceed the comfort levels of 1000ppm as recommended by the ASHRAE.

Temperature: between 22.1° and 24.8°C; recommended comfort levels by the ASHRAE are between 23° and 27°C.

Relative Humidity: between 1% and 11%; recommended comfort levels by ASHRAE are between 25% and 60%. Low relative humidity levels can cause dry skin, eye irritation, dry throat, general dehydration of the body."

Based on the above findings, on December 3, 1994, Mr. Tamboriello ruled verbally that there was no danger within the meaning of the Code. This ruling was confirmed in writing on December 8, 1994. Mr. Tamboriello's decision is set out on page 9 of his report:

"4. DECISION

Considering that,

- no abnormalities are reported concerning flight #122;*
- nothing in particular is observed with regard to the reported malfunctions of the air conditioning system of aircraft #208, nor of the entire A320 fleet;*
- the analyses (sic) of the air quality study, carried out in June 1994, does not reveal any major concern;*
- there are no reasons to believe that the air quality has changed since June 1994;*
- the implementation of the TECHNICAL BULLETIN #271 represents a noticeable improvement, when compared to the EMPLOYEE SAFETY BULLETIN;*

I have informed both parties verbally on December 3, 1994, of my decision that there is absence of danger. A written report will be forwarded as soon as possible."

That decision ended with the following recommendations:

"5. RECOMMENDATIONS:

In order to continuously improve the air quality, I encourage the operator to keep exploring innovative procedures, like the ones mentioned during the investigation concerning the maintenance schedule of the filters and the use of higher quality filters in the near future.

The air quality study reveals that the levels of CO2 exceed the comfort levels as recommended by the ASHRAE. This could very well be the reason for the numerous complaints of discomfort on board the A320 aircraft. To eliminate this, I suggest that the operator conducts periodic air quality studies, in order to keep track of the levels of airborne chemical agents that may cause discomfort in the working environment."

III

The right to refuse to work and the process that must be followed when that right is exercised are set out in sections 128 and 129 of the Code, the relevant parts of which provide as follows:

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place.

(2) An employee may not pursuant to this section refuse to use or operate a machine or thing or to work in a place where

(a) the refusal puts the life, health or safety of another person directly in danger; or

(b) the danger referred to in subsection (1) is inherent in the employee's work or is a normal condition of employment.

(3) Where an employee on a ship or an aircraft that is in operation has reasonable cause to believe that

(a) the use or operation of a machine or thing on the ship or aircraft constitutes a danger to the employee or to another employee, or

(b) a condition exists in a place on the ship or aircraft that constitutes a danger to the employee, the employee shall forthwith notify the person in charge of the ship or aircraft of the circumstances of the danger and the person in charge shall, as soon as practicable thereafter, having regard to the safe operation of the ship or aircraft, decide whether or not the employee may discontinue the use or operation of the machine or thing or to work in that place and shall inform the employee accordingly.

(4) An employee who, pursuant to subsection (3), is informed that he may not discontinue the use or operation of a machine or thing or to work in a place shall not, while the ship or aircraft on which the employee is employed is in operation, refuse pursuant to this section to operate the machine or thing or to work in that place.

(5) For the purposes of subsections (3) and (4),

(a) a ship is in operation from the time it casts off from a wharf in any Canadian or foreign port until it is next secured alongside a wharf in Canada; and

(b) an aircraft is in operation from the time it first moves under its own power for the purpose of taking off from any Canadian or foreign place of departure until it comes to rest at the end of its flight to its first destination in Canada.

(6) Where an employee refuses to use or operate a machine or thing or to work in a place pursuant to subsection (1), or is prevented from acting in accordance with that subsection pursuant to subsection (4), the employee shall forthwith report the circumstances of the matter to his employer and to

(a) a member of the safety and health committee, if any, established for the work place affected; or

(b) the safety and health representative, if any, appointed for the work place affected.

(7) An employer shall forthwith on receipt of a report under subsection (6) investigate the report in the presence of the employee who made the report and in the presence of

(a) at least one member of the safety and health committee, if any, to which the report was made under subsection (6) who does not exercise managerial functions;

(b) the safety and health representative, if any; or

(c) where no safety and health committee or safety and health representative has been established or appointed for the work place affected, at least one person selected by the employee.

(8) Where an employer disputes a report made to the employer by an employee pursuant to subsection (6) or takes steps to make the machine or thing or the place in respect of which the report was made safe, and the employee has reasonable cause to believe that

(a) the use or operation of the machine or thing continues to constitute a danger to the employee or to another employee, or

(b) a condition continues to exist in the place that constitutes a danger to the employee, the employee may continue to refuse to use or operate the machine or thing or to work in that place.

129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to

investigate the matter in the presence of the employer and the employee or the employee's representative.

(2) A safety officer shall, on completion of an investigation made pursuant to subsection (1), decide whether or not

(a) the use or operation of the machine or thing in respect of which the investigation was made constitutes a danger to any employee, or

(b) a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee referred to in subsection (1), and he shall forthwith notify the employer and the employee of his decision. ..."

(Emphasis added)

The Board's mandate in the context of a referral of a safety officer's decision under section 129(5) of the Code is set out in section 130(1):

130. (1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may

(a) confirm the decision; or

(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2). "

In this context, the Board's role is limited to reviewing the "circumstances" and "the reasons therefor" of the safety officer's finding of absence of danger, with a view to reviewing or confirming it, as the case may be:

"... The Board must direct itself to the nature and to the sufficiency of the consideration which the safety officer had given to the safety issue and to the refusal. "

(Stephen Brailsford (1992), 87 di 98 (CLRB no. 921), page 107)

In the light of recent Federal Court of Appeal decisions regarding the appropriate interpretation of the right-to-refuse provisions of the Code, it is now clear that the question the Board must answer is whether the safety officer was correct in finding at the time of his investigation that danger did not exist, regardless of what might have been the situation at the time of Ms. Di Palma's refusal. In other words, the Board's task is to determine whether the safety officer decided correctly, not whether the employee was right in believing originally that a danger existed (see Bidulka v. Canada (Treasury Board), [1987] 3 F.C. 630; and Canada (Attorney General) v. Bonfa (1989), 73 D.L.R. (4th) 364; and 113 N.R. 224 (F.C.A.)).

Thus, as the Board stated in Dennis C. Atkinson (1992), 89 di 76 (CLRB no. 958), it must direct its primary attention to reconstructing what the safety officer encountered during the course of his or her investigation:

"... While the situation might still be similar to that which originally prevailed when the employee called attention to it and refused to work because of the perceived danger, it might have completely changed, as happened here, or even been corrected in the view of the employer, and danger might no longer exist. In either case, the limited purpose for which the legislator established sections 128 and 129 - namely to allow persons to withdraw themselves from danger as defined by the Code - would have been met. ...

...

The wording of section 129(2) suggests, and common sense confirms, that the realistic focus of the safety officer's investigation mandate is on that which exists at the time of the investigation and on whether there is danger at that time. If the safety officer decides under section 129(5) that there is no danger within the meaning of the Code, the employee may require the decision to be referred to the Board. It is that decision, its 'circumstances' and 'the reasons therefor,' that the Board is called upon to review and confirm or not under section 130(1), not specifically the original perception of

danger by the employee who triggered the whole thing, although the latter is obviously the key circumstance in the whole matter leading up to the investigation. "

(pages 79-80 and 84)

Although this task does not imply a review of the process leading to the safety officer's decision, this does not mean, however, that the Board must be oblivious of what went on, particularly if it is of the view that the process may have worked against the parties' interests or otherwise prejudiced the outcome of the investigation. In this regard, the Board has already stated:

"The Board is not the watchdog that monitors the operation of Labour Canada's [in this case, Transport Canada, due to arrangements made between the two agencies] health and safety services in matters relating to health and safety. Our jurisdiction is strictly one of appeal, and then only on the question of whether or not a danger exists. Beyond that, it is not up to the Board to tell the inspectors how to proceed, and less still to exercise some sort of general superintending authority over Labour Canada's health and safety services. These matters are the responsibility of the courts.

However, it appears to us that, in the spirit of co-operation and complete openness that must attend decisions relating to safety, an investigating officer who wishes, for example to pay another visit to the work site in question, would do well to ensure that both sides are aware of his action and are given the opportunity to be present, if they so desire. "

(Denis Gagnon and Jean-Claude Michaud (1986), 65 di 137 (CLRB no. 572), pages 148-149; emphasis added)

In the instant case, a three-month period separated Ms. Di Palma's refusal to work and the safety officer's decision. This, needless to say, was an inordinately long time given the nature of the right involved and the purpose to be served by the safety officer's investigation. As the sequence of events reviewed above clearly shows, the refusal process was marked with considerable confusion. This was largely due to the

the fact that both the employer and the safety officer questioned the procedural validity of Ms. Di Palma's refusal. It is not material at this stage to determine who followed the Code and who did not. Suffice it to say that in the final analysis, the overly dogmatic interpretation of the refusal process that prevailed here served no one's interests. All it did was put off the resolution of the problem, while adding fuel to the flames by aggravating the tensions and frustrations that had already stemmed from the refusal.

In a previous decision, the Board explained the refusal process and the rationale behind the various steps that must be followed in such cases. In view of what happened here, it is useful to reproduce that statement *in extenso*:

"The refusal process, and the determination of what is to be done vis-à-vis a refusal, may be viewed as an ongoing series of steps, with various rights and obligations arising along the way. The process begins when an employee, while at work has reasonable cause to believe that the use or operation of a machine or thing constitutes a danger or that a condition exists in the place which threatens danger. The employee may refuse to work in the face of that perceived danger. Section 128(6) requires the employee to report the situation and the refusal to the employer and to a member of the safety and health committee or to the safety and health representative 'forthwith.' (Whether there is a safety and health committee or a safety and health representative depends on other regulations and has to do mainly with the size of the work-force.)

The Board has taken the position in other cases that an employee's failure to notify a safety and health committee member or a representative does not nullify the process at this stage, nor does it deny an employee access to section 133. Obviously, there is an absolute necessity to notify the employer, in order, among other things, that something could be done immediately about the alleged danger, if found then by the employer to exist. Presumably there are refusals to work that are reported to employers, where dangers are eliminated immediately, and that is as far as the process goes or needs to go. These situations are, of course, unknown to the outside world and not capable of being counted.

For certainty, however, the Code gives formal expression in section 128(7) to the employer's obligation to pay attention to an employee's report concerning perceived danger and to respect his or her refusal to work. An employer must investigate the employee's report in the presence of the employee and a non-management member of the safety and health committee or a safety and health representative or a person selected by the employee, depending upon the circumstances of the case. Again, the absence of a third party to witness the investigation does not render this step in the process to be a nullity. On the other hand, neither the employer nor the employee could insist that a third party be barred from involvement if the other insisted on such a presence.

Section 128(8) contemplates that the employer, after the investigation, will either take steps to change the machine, thing or place so as to try to remove the danger, or may insist that no danger exists, either because the employer thinks it was not there in the first place or because it has since disappeared - like unpleasant cigarette smoke. The employee, however, may continue to believe that the action taken by the employer has not eliminated the danger or may be in disagreement with the employer's conclusion that the danger does not exist. He or she continues to enjoy the protection of the Code against the possibility that there may in fact still be danger; he or she may continue to act upon his or her 'reasonable cause to believe' that danger persists and may continue to refuse to do the work.

In this situation of stand-off, the impartial third party who decides whether the situation is still dangerous is the safety officer. Section 129(1) provides that both the employer and the employee have the responsibility to ensure that a safety officer is involved to resolve the impasse. By putting the responsibility on both parties, the legislator avoided the difficult problem of deciding which one, the employer or the refusing employee, had the primary interest in ensuring a resolution of the dispute. To the legislator, one thing was certain: one or the other of the disputants would certainly have an interest in bringing the matter to a resolution and thus one or the other, if not both, would undoubtedly summon the safety officer without delay.

Occasionally, this dual responsibility provision has given rise to problems of another kind. It has happened that an employee has failed to notify a safety officer. The notification has come only from the employer. The safety officer makes a finding that danger does

not exist. The employer makes the mistake of penalizing the employee for having exercised the right to refuse. The employee then complains to the Board that he or she has been penalized contrary to section 147(a). The complaint is made under section 133, the relevant portion of which reads as follows:

...

The employer argues that the Board cannot deal with the complaint because the employee has not complied with section 129(1) in that he or she did not notify the safety officer. The Board, however, has taken the position that the employee's failure to make the notification is a matter of form only and is not fatal to the complaint. This view is supported by the fact that section 129(1) requires the safety officer 'forthwith' on the receipt of notification from either the employer of the employee - not both - to investigate the matter."

(Dennis C. Atkinson, *supra*, pages 82-84; emphasis added)

IV

The safety issue under review must have constituted a danger pursuant to the Code. That notion is defined in section 122(1) as follows:

"'danger' means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected."

In *Alan Miller* (1980), 39 di 93; [1980] 2 Can LRBR 344; and 80 CLLC 16,048 (CLRB no. 243), the Board commented on the standard of judgment it must apply to the question of whether or not a danger exists. It stated:

"The nature of the safety officer's decision and the legal consequences which flow from it as described above illustrate clearly that the standard of judgment on the question of whether or not

imminent danger exists shifts, at this stage, to one which is more objective than the reasonable cause for belief permitted the refusing employee during the initial and investigative stages in section 82.1. ... "

(pages 101; 350; and 752)

Commenting on the notion of danger in an earlier decision, the Board explained the distinction between what constitutes a normal condition of work and what is a dangerous working environment:

"A certain degree of danger exists in most occupations but the risk of injury naturally varies from industry to industry. For example, bank employees are not exposed to the dangers normally faced by miners. A steel erector's normal day's work contains extreme danger as compared with a letter carrier's and, we are now well aware of the risk of employment injury an asbestos worker is normally exposed to. Those are the normalities contemplated by subsection (12). It does not include unlawfully dangerous workplaces or work practices regardless of how normal they may have become to employees. In short, normal or standard work practices are a consideration when assessing whether or not a danger is so imminent that it prevents an employee from continuing to perform his duties. A finding that imminent danger does not exist under section 82.1 does not necessarily mean that danger does not actually exist or that remedial action or further inquiry is not required."

(Ernest L. LaBarge (1981), 47 di 18; and 82 CLLC 16,151 (CLRB no. 357), pages 26; and 551; emphasis added)

Although these observations were made before Parliament amended the Code's definition of danger, to remove from it the word "imminent," they are still valid. In François Lalonde (1989), 77 di 9 (CLRB no. 731), the Board relied on these observations to define the issue before it and stated: *"The Board must always ask itself whether the alleged danger that the Labour Canada safety officer did not see fit to characterize as such does not in fact constitute a normal work practice for a given*

job" (page 11). That distinction was explained very clearly in David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686):

"... For the purposes of these sections, which I believe are the only provisions in Part IV [now Part II] that refer to danger, the risk cannot be something that is inherent in an employee's work or a normal condition of employment (section 85(2)). For example, a steeplejack could not refuse to work at heights because of a personal fear of heights. Working at heights is inherent in a steeplejack's work and it is also a normal condition of employment. If, however, icy conditions prevailed, the steeplejack could refuse to work in those conditions and would receive the full protection of the Code. ..."

(pages 224; and 316)

For all intents and purposes, removing the word imminent from the definition of danger has not changed its meaning. The notion of immediacy is still implicit in the sense that the Code's definition of "danger" still contemplates "*a situation where the injury might occur before the hazard could be removed*" (according to Labour Canada's definition of danger adopted by the Board in its decisions; see for example Alan Miller, *supra*, pages 104; 353; and 754; Roland D. Sabourin (1987), 69 di 61 (CLRB no. 618); Pierre Guénette (1988), 74 di 93 (CLRB no. 696); and David Pratt, *supra*, pages 223-224; and 315-316). Thus, in order to meet the Code's definition, the danger must be immediate and real: in other words, the risk to the employee must be serious to the point where the work must stop until the situation is rectified, i.e. the source or cause of danger removed. Evidently, this would not imply replacing one dangerous situation with another (see Eleanor Hasle (1991), 85 di 94 (CLRB no. 873)). This also means that the risk must not originate from the employee's personal condition. Furthermore, the danger must be one that Parliament intended to cover in Part II of the Code. Accordingly, this would exclude a danger arising from a situation where the risk is inherent in the employee's work or is a normal condition of work

(section 128(2)(b)): see by analogy Gilles Lambert (1989), 78 di 69 (CLRB no. 748), page 79).

That interpretation is also in keeping with the spirit and purpose of the right of refusal which is designed as "*an emergency measure to deal with dangerous situations which crop up unexpectedly*" (David Pratt, supra, pages 226; and 318), not as a primary vehicle to attain the objectives of Part II of the Code or as a "last resort" to bring existing disputes to a head or to settle long-standing disputes (William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332); Ernest L. LaBarge, supra; David Pratt, supra; and Stephen Brailsford, supra).

V

Ms. Di Palma's safety concerns during the September 9, 1994 flight pertained to the sufficiency of the airflow on board the aircraft. This is what made her consider the environment dangerous to her health. In her report on the issue, she stated that she felt "*a lack of air (HYPOXIA)*" and more particularly, a "*lack of oxygen*". Ms. Di Palma did not claim or suggest that the air quality *per se* was deficient in the sense that her safety was endangered by exposure to a hazardous substance. In other words, she did not claim that the air was contaminated; what she claimed was that there was not enough air. Thus, although the safety concern under consideration here clearly falls under the overall air quality heading, it is one of air quantity; not one of air quality per se.

This was made clear in Ms. Di Palma's November 16, 1994 written confirmation to the company concerning her decision to continue to refuse to work. We will recall that prior to this, the company had taken steps to rectify the situation that had triggered Ms. Di Palma's refusal to work by issuing a new Technical Bulletin in which the selection of the pack's HIGH setting any time a crew member requested it was

rendered mandatory. In support of her decision to continue to refuse to work, Ms. Di Palma stated:

"Mr. Lafleur, I am READY and WILLING to work my flight tomorrow morning but only if I am guaranteed in writing that the airflow will be on maximum at all times, on all aircrafts (sic), no matter what the load is and without having to ask the pilots for more air once I am already feeling the symptoms of lack of oxygen, because at this point the damage to my body has already been done.

I have repeatedly suffered deprivation of oxygen on my flights and my physical and mental health has been affected by it. I can no longer continue to do so. ..."

Thus, the issue to be determined here is whether, at the time of the safety officer's investigation, the quantity of air available for flight attendants on board the aircraft involved in Ms. Di Palma's work refusal constituted a danger to the employee.

In the course of his investigation, the safety officer did not visit the aircraft involved, nor did he carry out any tests on site to determine whether a condition in the work place constituted a danger to the employee. The safety officer relied upon the results of a study on cabin air quality conducted by Airbus Industries at Air Canada for its A320 fleet to determine whether there was a likelihood that the employee had been exposed to a concentration of an airborne chemical agent in excess of the maximum acceptable value for that agent.

Certain substances are known to be a cause of discomfort and health problems if present in sufficient quantities. In accordance with the Code and its Regulations (in this case the Aviation Occupational Safety and Health Regulations, SOR/87-182, March 26, 1987), standards have been adopted concerning threshold limits for exposure to these chemical agents. These standards found in a document identified as Threshold Limit Values and Biological Exposure Indices for 1986-1987, are those adopted by the American Conference of Governmental Industrial Hygienists (ACGIH).

They establish "airborne concentrations of substances, and represent conditions under which it is believed that nearly all workers may be repeatedly exposed day after day without adverse effect" (page 2). The Threshold Limit Values (TLVs) are expressed in terms of Time Weighted Averages (TWA), Short Term Exposure Limit (STEL), and Threshold Limit Value - Ceiling (TLV-C), i.e. concentration that should not be exceeded during any part of the working day. The TLVs relate only to exposure to specific chemicals in isolation. In the document, it is noted that "*because of wide variation in individual susceptibility ... a small percentage of workers may experience discomfort from some substances at concentrations at or below the threshold limit; a smaller percentage may be affected more seriously by aggravation of a pre-existing condition or by development of an occupational illness*" (page 2).

Based upon those results and upon his review of the conditions of the September 9, 1994 flight as well as the events that took place during that flight, the safety officer concluded that the aircraft's cabin air quality did not reveal any major concern and that there were no reasons to believe that the air quality had changed since. Since no abnormalities had been reported concerning flight #122 and no particular malfunctions of the A320 aircraft air conditioning system were observed, and the implementation of Technical Bulletin #271 represented a noticeable improvement, he determined that there was no danger pursuant to the Code.

The emphasis placed by the safety officer on air contaminants left the impression that he had treated the purported danger as one pertaining to air quality *per se*, as opposed to one involving air quantity. Furthermore, although the safety officer found that there was no danger, he nevertheless issued recommendations to improve air quality. This left the parties unsure as to where they stood and, as a result, they found it necessary to present to the Board a substantial amount of evidence to reconstruct the investigation undertaken. The Board heard evidence from 13 persons, including several expert witnesses who provided information and opinions based upon their professional and technical expertise.

However, notwithstanding the nature and scope of the safety officer's investigation and the apparent confusion surrounding his findings, having regard to all the evidence adduced and to the submissions filed, we cannot see anything that would prompt us to upset his decision.

CUPE argued that the Board could not accept the safety officer's decision because it was based on inconclusive evidence. The safety officer's findings did not pertain specifically to the A320 aircraft involved since he relied on an air quality study applicable to the entire A320 fleet and that study had been conducted some six months prior to the refusal. Moreover, the information relied upon by Mr. Tamboriello indicated that there was a high reading of carbene dioxide (CO_2) in the aft galley. The carbon dioxide concentration level is frequently used as an indication of general air quality where there are significant metabolic or combustion sources of carbon dioxide. In this regard, Dr. Douglas Walkinshaw, an expert on ventilation systems, submitted that based upon his calculation, those CO_2 levels indicated that the quantity of fresh air in the cabin was only 5 cubic feet per minute (cfm) per crewmember as opposed to the minimum of 10 cfm per crewmember standard.

Although Dr. Walkinshaw's calculations are not to be questioned, they were based upon the results of a spot check reading found in the Airbus study which had not been averaged over an eight hour period, as is normally the case. Furthermore, although carbon dioxide may be a useful indicator of general air quality in buildings, studies clearly caution against relying on those concentrations as a general indication of indoor air quality environments where the particulars of such environments differ. The aircraft cabin is a unique environment. Thus, the usefulness of such a method to indicate general air quality in this particular environment still remains to be established.

In our view, what is relevant here is that no aircraft may be flown unless certified as airworthy by the Canadian Minister of Transport. No certificate of airworthiness is

issued pursuant to the Aeronautics Act, R.S.C. 1985, c. A-2, unless the aircraft is maintained in accordance with a maintenance program that meets the standards of airworthiness established by the Minister of Transport pursuant to the Air Regulations adopted under that Act. At all relevant times, Air Canada held a certificate of airworthiness for the A320 aircraft involved in Ms. Di Palma's work refusal. This, in our view, creates a presumption that the aircraft's cabin air quality met all governmental standards under all normal and failure conditions, and that presumption was not rebutted here.

The Airbus A320 aircraft's air conditioning system has been designed to meet all airworthiness requirements and industry wide standards with respect to air quality. Accordingly, the aircraft is certified on the basis that ventilation airflows are equal or greater than 10 cfm per occupant, on the basis of a maximum load which is significantly higher than the maximum passenger load set by Air Canada. The manufacturer's air conditioning system is designed to satisfy a 170 passenger load while Air Canada operates with 137 seats and guarantees non-smoking flights.

Taking into account cabin volumes, the airflows on A320 aircraft ensure a complete air exchange every three or four minutes. The air used for pressurization and temperature control is an equal combination of fresh air supplied from the engine bleed air system via the two air conditioning packs and filtered air recirculated from the passenger cabin. At cruise altitude, outside air is not contaminated. The only potential contaminant is ozone which can be eliminated by catalytic converters installed on the cabin air supply system. The Air Canada fleet is equipped with such converters. The ventilation rates are sufficient to eliminate all contaminants generated within the cabin (CO, CO₂, volatile organic compounds, etc.). Recirculated air is filtered by high efficiency filters removing dust, bacteria and viruses. Air from toilets, galleys and cargo areas is ducted overboard and thus not recirculated.

The A320 aircraft's air conditioning system is designed to operate at most times on the low and normal settings. The high setting is to be used only in abnormally hot and humid conditions. Those settings have a bearing on the cabin's airflow and air exchange rates and therefore on the cabin's ventilation, temperature and humidity level, but none on the air's oxygen content.

The air is a mixture of gases and in such a mixture the partial pressure exerted by any one gas will be equal to its percentage to the mixture. The CO₂ concentration in the cabin depends on the ventilation rate, the number of people present, and their individual rates of CO₂ production which vary with activity and the use of certain products such as dry ice, and, to a lesser degree, with diet and health. In several studies, comfort factors have been correlated with carbon dioxide concentrations. Comfort, however, is not the issue here.

The normal work environment of a flight attendant is a pressurized cabin. In the case of the A320 aircraft, pressurization of the cabin is set at 8000 feet. As Air Canada's senior medical director, Dr. Claude Thibault explained, of all the factors that play a part in the makeup of the air, pressurization is the most significant one, since it is the only one that has a direct bearing on the level of oxygen available. If you pressurize at 8000 feet, the environment will reflect this and the level of oxygen available will be that which is found at 8000 feet above sea level. Naturally, the human body reacts accordingly. Thus, mild hypoxia - inadequate oxygenation of the tissues - is a normal condition in such an environment. Although this is not a condition which is in itself damaging to a person's health (you either adapt or recover), it is a fact that a minority of people have a reduced tolerance level to that kind of a milieu and therefore show a greater sensitivity and develop more symptoms. All standards are developed on the basis that they meet the need of the greater majority of people. ASHRAE (American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc.), for instance, defines acceptable indoor air quality as "*air in which there are no known contaminants at harmful concentrations as determined by cognizant authorities and with which a*

substantial majority (80 percent or more) of the people exposed do not express dissatisfaction" (see ASHRAE 1981, ASHRAE standard 62-1981, ventilation for acceptable indoor air quality; and ASHRAE 1989, ASHRAE standard 62-1989, ventilation for acceptable indoor air quality).

We have listened with interest to the testimonies of the experts on air quality and read the technical material submitted. We are satisfied that the air conditioning system does not change the oxygen level. Improper ventilation may lead to toxic exposure and discomfort, but it will not affect the amount of oxygen available. The same can be said of the other factors that play a part in the overall air quality: air contaminants (biochemicals and bioeffluents), recirculation of fresh and used air, temperature, and relative humidity.

We must remember that the danger contemplated by the Code must be so immediate and real that all work activity must be interrupted until the situation is corrected. This was clearly not the case here at the time of the safety officer's investigation. The purported danger was not one contemplated by the Code. At best, it was a condition inherent to Ms. Di Palma's work, although one which, as everyone recognizes, is in need of constant monitoring and improvement. At worst, it was a personal condition. It may very well be that Ms. Di Palma is more sensitive to this type of environment than the greater majority of people. However, if this is the case, this is not a relevant factor since the danger contemplated must originate from the environment, not from the person who feels it.

Undoubtedly, the issue of airflow and, more generally, of overall air quality is a very sensitive one for all parties involved and a very emotional one for Ms. Di Palma. This was reflected in the great care everyone took in presenting their case. However, there is no doubt either that the safety issue which is at the source of the purported danger invoked here is an ongoing one. The situation that triggered Ms. Di Palma's work refusal was no more than the crystallization of a long-standing dispute concerning the

procedure governing airflow on board A320 aircraft. The problem is not new, and discussions about airflow and overall air quality have been ongoing for some time between the company and CUPE through the OH&S Committee. These problems are not limited to the A320 fleet. Ms. Di Palma does not deny this. In fact, she referred several times to her history of difficulties in this regard during various flights, some of which were not on the A320 aircraft.

The symptoms experienced by flight attendants, such as fatigue, headache, tiredness, nausea and illness are often attributed to cabin air quality. However, that assumption still remains to be confirmed. Other studies suggest that those symptoms are more likely due to an interaction of factors that include cabin altitude, flight duration, jet lag, turbulence, noise, work levels, dehydration, and an individual's health and stress. Given this, it has been recognized that there was a need both for further study and monitoring of the situation as well as for the development of standards adapted to the uniqueness of the cabin environment. The recent creation of an ASHRAE subcommittee for aircraft presents a clear indication that the issues are being addressed and that serious efforts are being made to achieve these objectives:

"Current indoor air quality standards such as ASHRAE (62-1989) standard have been shown to work well for building design, but have not been shown to apply to airplanes. The ASHRAE Technical Committee 9.3, "Transportation Air-Conditioning," recognizes this and recently established a subcommittee for aircraft, comprised of individuals that includes flight attendants, manufacturers, component suppliers, governmental regulators and health experts. It is the mission of this new subcommittee to further research the airplane cabin environment and look in detail at all possible causes of flight attendant and passenger symptoms and complaints.

The end goal is an ASHRAE air quality standard for commercial aircraft which will specify cabin air content and characteristics to assure acceptable levels of safety, health and comfort for passengers and flight crew."

(E.H. Hunt and D.R. Space, The Airplane Cabin Environment, Issues Pertaining to Flight Attendant Comfort, Boeing, 1994, page 10)

Even though the situation which triggered Ms. Di Palma's refusal did not constitute a danger within the meaning of the Code, it was certainly one for which remedial action and further enquiry were required. Air Canada responded to the concerns expressed, having since taken steps to correct the situation. Although the changes brought to the procedure governing the use of air packs did not satisfy Ms. Di Palma, this nevertheless represented a significant improvement to the situation that prevailed prior to her refusal. Ms. Di Palma insisted that the airflow setting be left on high at all times, a position which was endorsed by CUPE. In this regard, we should point out that the evidence adduced indicated rather that such a solution may prove more problematic than the one it is meant to correct. A system built to function at a normal setting cannot be used consistently at maximum capacity without the possibility of creating safety hazards, such as premature deterioration of the aircraft, as well as causing other types of discomfort which, for some people, may prove to be less tolerable than for the ones who are insisting on that solution.

Taking everything into consideration, we agree with the bottom line of the safety officer's decision that danger within the meaning of the Code did not exist as far as Ms. Di Palma's work environment was concerned on September 9, 1994. We therefore confirm the safety officer's decision to that extent.



Véronique L. Marleau
Member

information

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Summary

Transportation-Communications International Union, Local 2315, and Jose Holz, *complainants*, and Canadian Pacific Express and Transport Ltd., *respondent*.

Board File: 745-4886
CLRB/CCRT Decision no. 1132
July 13, 1995

In this case, the Board deals with complaints of an unfair labour practice by the Employer. The Union says the employer disqualified an employee from further light duty security work for reasons that violate ss. 94(1)(a) and 94(3)(a)(i) of the Code. The employee, a former driver and warehouse worker, was assigned the position as part of an agreement between the Employer and the Workers' Compensation Board. The position was not considered bargaining unit work.

The Board finds that the Employer's decision was affected by the fact that the employee telephoned a union representative the day before a spot security check the Employer had planned for drivers. The union representative, one of the drivers, telephoned the Employer to discuss the employee's concerns at being asked to participate in searches of drivers and their possessions. When the employee arrived that evening to work the security check, he was disqualified.

Résumé

Syndicat international du transport-communications, section locale 2315 et Jose Holz, *plaignants* et Canadien Pacifique Express et Transport Ltée, *intimée*.

Dossier du Conseil: 745-4886
CLRB/CCRT Décision n° 1132
le 13 juillet 1995

Dans cette affaire, le Conseil tranche des plaintes de pratiques déloyales de travail déposées contre l'employeur. Le syndicat prétend que l'employeur a mis fin à l'affectation d'un employé à des travaux légers de sécurité pour des motifs qui vont à l'encontre de l'alinéa 94(1)a) et du sous-alinéa 94(1)a)(i) du Code. L'employé, ancien chauffeur et magasinier, avait été affecté à de nouvelles fonctions aux termes d'une entente conclue entre l'employeur et la Commission des accidents du travail. Le nouveau poste de l'employé ne faisait pas partie de l'unité de négociation.

Le Conseil est d'avis que la décision de l'employeur découle de l'appel que l'employé a fait au représentant syndical la veille d'une vérification de sécurité que l'employeur avait organisée à l'égard des chauffeurs. Le représentant syndical, lui-même chauffeur, a communiqué avec l'employeur pour discuter des préoccupations que ce contrôle des chauffeurs et de leurs possessions suscitaient chez l'employé. Lorsque celui-ci s'est présenté à son poste en soirée, on a mis fin à son affectation.

The Board concludes the Employer's decision was not tainted by anti-union animus, and that it was taken for compelling and justifiable business reasons. The complaints are dismissed.

Le Conseil ne considère pas que la décision de l'employeur soit entachée de sentiment anti-syndical. Il conclut plutôt qu'il s'agit d'une décision d'affaires nécessaire motivée. Les plaintes sont donc rejetées.

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Reasons for decision

Transportation-Communications International
Union, Local 2315, and Jose Holz,

complainants,

and

Canadian Pacific Express and Transport,

respondent.

Board File: 745-4886
CLRB/CCRT Decision no. 1132
July 13, 1995

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair and Members François Bastien and Sarah E. FitzGerald. A hearing was held on April 25, 1995, at Vancouver.

Appearances

Mr. Michael Flynn, for the complainants, assisted by Mr. Brian Lind; and Mr. Michael D. Failes, for the respondent, assisted by Messrs. Brian F. Weinert and Wayne Smith.

These reasons for decision were written by Ms. Sarah E. FitzGerald, Member.

I

In this case, the Transportation-Communications International Union, Local 2315 ("TCIU" or the "Union") complains on its own behalf and on behalf of Mr. Jose Holz that the employer violated sections 94(1)(a) and 94(3)(a)(i) of the Canada Labour Code (Part I - Industrial Relations).

At the time TCIU filed the complaint, the employer was CP Express & Transport. As a result of an employee buyout, the national truck carrier now operates under the name Interlink Freight Systems Inc. For the purposes of this decision, "Employer" means the then existing CP Express & Transport.

TCIU complains of the Employer's decision to disqualify the complainant, Mr. Holz, from light duty security work he had been assigned as part of an agreement with the Workers' Compensation Board. Because of injuries, Mr. Holz could no longer perform the duties of driver and warehouse worker. He had been receiving rehabilitation benefits for a period of 2 years.

Following the Employer's decision to disqualify Mr. Holz from further light duty security work, the WCB terminated rehabilitation benefits because Mr. Holz lost the security position for reasons other than physical inability to perform the duties.

The Union disputes the reasons given for the disqualification. Mr. Holz was disqualified by Mr. Wayne Smith, the Employer's Vancouver Area Manager on May 20, 1994. This was the night of a special security check that Mr. Smith had arranged for traffic passing through the gate at the Employer's Port Coquitlam, B.C. terminal. Mr. Smith had assigned Mr. Holz to work the security check with a Constable from the CP Police. When Mr. Holz arrived for his shift that evening, Mr. Smith handed him a memo stating:

"Please be advised that effective today I am disqualifying you from the security duties. You have not displayed the work ethic, trustworthiness, or the dependability I require for the position. I am not confident you will even show up for your designated shift let alone insure my directions are being followed. I am not prepared to take the chance the premise will be left unattended. Please report back to your W.C.B. caseworker for direction."

Mr. Smith says he made this decision on the day of the security check, following a report from the CP Police, of two telephone calls from Mr. Holz. In the first call, Mr. Holz asked to be met by the Constable at a Vancouver pier, and given a ride to the terminal. In the second call, Mr. Holz advised that he might be one and a half hours late for his shift. Mr. Smith says that after hearing about these telephone calls, he concluded he could not rely on Mr. Holz.

The Union maintains that the real reason for the disqualification was a telephone call Mr. Holz made to Brian Lind, TCIU Local Protective Chairman, the day before the security check. On that day Mr. Holz left a message at TCIU's offices expressing his concern at having to participate in a security check of the drivers and warehouse workers with whom he had worked for many years. Mr. Lind, in addition to being a TCIU representative, was also one of the drivers that would be subject to the security check. Upon receipt of that message Brian Lind telephoned Mr. Smith to discuss the complainant's duties in the security check, and satisfied himself that Mr. Holz would not have to actually search employees or their possessions. Mr. Smith disqualified Mr. Holz the moment he arrived for his shift that evening.

TCIU says that disqualification because of the telephone call to Brian Lind constitutes improper interference with the rights of both the Union and Mr. Holz, contrary to sections 94(1)(a) and 94(3)(a)(i) of the Code. These sections state that:

"94(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or..."

...

"94(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or

intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,..."

TCIU characterizes the purpose and content of Mr. Holz's telephone call to Brian Lind as consultation with a union representative about terms and conditions of work.

II

The evidence reveals the following. The light duty security position was not considered bargaining unit work. A letter from Canadian Pacific Legal Services advises:

"Mr. Holz is aware the position will be re-evaluated every six months, as he must have Union permission to take the non-union position in order to retain his seniority in the organization. He will be paid the same wage as his layoff position, shown in the position bulletin which you have on file ..."

When Mr. Smith briefed Mr. Holz on May 19 about the May 20 special security check, he advised Mr. Holz that he would work alongside a CP Police Constable in a role akin to that of lead hand. They would check all persons, vehicles and trailers entering and leaving the terminal. Mr. Smith wanted to ensure that only those with proper passes or dispatches entered terminal property, that trailers were properly sealed, that drivers entering the terminal did not access their personal vehicles before completing delivery of their loads, that access by warehouse employees to personal vehicles during work be restricted, and that there be no alcohol on terminal property. Mr. Holz expressed his concern about the assignment given his past working relationship and friendships with the drivers and warehouse workers, but agreed to do

it. Mr. Smith asked him to telephone Inspector O'Reilly of the CP Police to make arrangements to meet the Constable assigned to the security check.

Following that meeting, Mr. Holz telephoned and left a message for Brian Lind at TCIU offices. Mr. Lind made his telephone call to Wayne Smith the following morning, the day of the security check. Later that day Mr. Smith also heard from Inspector O'Reilly of the CP Police. The Inspector informed Mr. Smith of Mr. Holz's request to be met by the Constable assigned to the security check, and Mr. Holz's telephone call indicating he might be late for the shift. The Inspector also advised Mr. Smith that he told Mr. Holz he should be calling Mr. Smith if he was going to be late, not the CP Police. Mr. Holz did not contact Mr. Smith.

Mr. Smith says that Inspector O'Reilly's telephone call led him to conclude Mr. Holz was unreliable. Mr. Smith decided he would have to remain at the terminal that evening to assist with the security check. He says it was at this point that he decided to disqualify Mr. Holz and prepared the memo.

Mr. Holz arrived for his 7:00 p.m. shift at 7:10 p.m. Mr. Smith was waiting and in an angry mood. He gave Mr. Holz the memo of disqualification, stating that he felt "betrayed".

III

Mr. Smith acknowledges that he considered Mr. Holz's telephone call to Brian Lind to be a security breach. He says that it was not the fact that the call was to a union representative that bothered him, but that Mr. Holz had revealed plans for a special security check. Mr. Smith maintains however, that the telephone call to Brian Lind was not a factor in his decision to disqualify Mr. Holz.

The complainant acknowledges that he assumed that drivers should not be warned about special security checks and that he knew Brian Lind was a driver, in addition

to being a TCIU representative. Mr. Holz says though, that he did not realize he was doing anything wrong because Mr. Smith had not told him the security check was confidential.

We find neither Mr. Smith's nor Mr. Holz's explanations to be entirely satisfactory. We do find it extraordinary that Mr. Holz did not recognize the breach of confidence in alerting anyone, union representative or not, and in this case one of the drivers, to the Employer's plans to conduct security checks of drivers and warehouse workers.

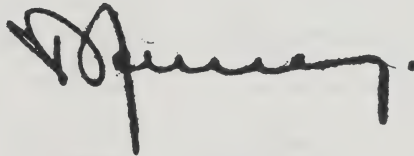
We believe that the telephone call the complainant made to Mr. Lind was a significant factor in Mr. Smith's decision. However, we accept that it was Mr. Holz's call to a person external to the confidential security arrangements, rather than the fact that the call was made to a union representative, that so angered Mr. Smith. This was particularly so, given Mr. Lind's position as a driver.

Although Brian Lind is a union representative and the call might be said to concern terms and conditions of work, this is not sufficient in our view to cloak this call and its contents with the Code's protection under s. 94(3). Even assuming that Mr. Holz's telephone call could be considered as a form of participation in the "promotion, formation or administration of a trade union" within the meaning of section 94(3)(a)(i), we would conclude in any event that Mr. Smith's decision was not tainted with anti-union animus. The section 94(3) complaint is dismissed.

Concerning the section 94(1)(a) complaint, we find that neither Mr. Holz's telephone call to Brian Lind, or Mr. Lind's call to Wayne Smith concerned matters of trade union "administration". See ATV New Brunswick Limited, (CKCW-TV) (1978), 29 di 23; and [1979] 3 Can LRBR 342 (CLRB no. 149).

Whether the Employer's actions could be said in the alternative, to affect the Union's "representation of employees" within the meaning of s. 94(1)(a) is less clear, given Mr. Holz' status and the nature of his work assignment. We do not find it necessary

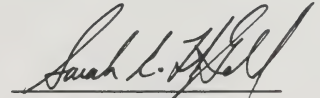
to determine this matter as we accept that the Employer's decision was based on "compelling and justifiable business reasons". To the extent a section 94(1)(a) union right has been affected, there is no "interference" within the meaning of that section. See Letter Carriers Union of Canada v. Canada Post Corporation (1995), as yet unreported CLRB decision no. 1110, pages 15-20). The section 94(1)(a) complaint is therefore also dismissed.



Richard I. Hornung, Q.C.
Vice-Chair



François Bastien
Member



Sarah E. Fitzgerald
Member

information

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Summary

Télébec Ltée, employer, and Canadian Telephone Employees' Association, Teamsters, Brewery, Soft Drink and Miscellaneous Workers' Union, Local 1999, International Brotherhood of Electrical Workers, Local 2365, Communications, Energy and Paperworkers Union of Canada, Local 81, and Syndicat des travailleurs et travailleuses de Télébec-CSN, applicant unions and mis-en-cause.

Board Files: 555-3752
555-3754
555-3773
555-3880
555-3901
555-3902

CCRT/CLRB Decision no. 1133
August 1, 1995

These reasons deal with six applications for certification for various groups of employees of Télébec Ltée. The applications were filed following the Supreme Court of Canada judgment in Téléphone Guèvremont Inc. v. Québec (Régie des télécommunications), [1994] 1 R.C.S. 878.

The Board first determined that it was validly seized of the applications and that it had constitutional jurisdiction to deal with them. It then questioned whether it was appropriate to redefine the existing bargaining units given

Résumé

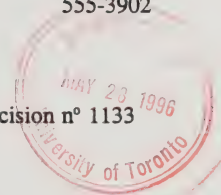
Télébec Ltée, employeur, et Association canadienne des employés de téléphone, Union des routiers, brasseries, liqueurs douces et ouvriers de diverses industries, section locale 1999, Fraternité internationale des ouvriers en électricité, section locale 2365, Syndicat canadien des communications, de l'énergie et du papier, section locale 81, et Syndicat des travailleurs et travailleuses de Télébec-CSN, syndicats requérants et mis en cause..

Dossiers du Conseil: 555-3752
555-3754
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555-3902

CCRT/CLRB Décision n° 1133
le 1 août 1995

Les présents motifs traitent de six demandes d'accréditation visant divers groupes d'employés travaillant pour Télébec Ltée. Ces demandes font suite au jugement rendu par la Cour Suprême du Canada dans Téléphone Guèvremont Inc. c. Québec (Régie des télécommunications), [1994] 1 R.C.S. 878.

Après avoir déterminé qu'il est valablement saisi des dites demandes d'accréditation et qu'il a la compétence constitutionnelle pour les trancher, le Conseil s'est demandé s'il est approprié de redéfinir les unités de



the history of labour relations at this employer and the continual technological evolution in the field of telecommunications.

The Board decided to review the bargaining units established pursuant to provincial certifications. It rejected the proposition presented by some parties of maintaining the status quo until more was known about the various technological changes that Télébec would face. The elimination of the company's geographical administrative structure, the change in the regulation of its operations as well as the profound impact of technological changes on its management procedures and its employment structure were sufficient reasons for the Board to rationalize the collective bargaining structure.

The community of interest, employment security and labour mobility in a rapidly evolving industry were factors that led the Board to find that two units are appropriate for collective bargaining at Télébec: one that will comprise all technicians; the other all office employees. The Board did not deem appropriate to separate office employees working at headquarters from those working in the regions since certain corporate functions performed by clerks exist to the same extent at headquarters as in the regions.

In view of these exceptional circumstances, where the transfer of constitutional jurisdiction occurred in a particular labour relations context involving raid and review applications of all the bargaining units, the Board was not satisfied that the majority of employees

négociation existantes, compte tenu de l'historique des relations de travail chez cet employeur et de l'évolution technologique constante dans le domaine des télécommunications.

Le Conseil a décidé de redéfinir les unités de négociation qui existaient en vertu de accréditations provinciales. Il a rejeté l'option proposée par certaines parties de maintenir *statu quo* jusqu'à ce que les divers changements technologiques auxquels Télébec doit faire face soient mieux définis. La disparition de la structure administrative géographique de l'entreprise, la modification du cadre réglementaire dans lequel elle opère de même que l'impact profond de changements technologiques sur ses processus de gestion et sa structure d'emploi justifient pour le Conseil d'instaurer une certaine rationalité dans la structure de négociation collective.

Les facteurs de communauté d'intérêts, de sécurité d'emploi et de mobilité de la main d'oeuvre dans un secteur d'activité en évolution ont donc amené le Conseil à juger habiles à négocier deux unités de négociation chez Télébec. Tous les techniciens seront regroupés dans une unité de négociation alors que tous les employés de bureau formeront une seconde unité de négociation habile à négocier. Le Conseil n'a pas jugé approprié de séparer les employés de bureau travaillant au siège social de ceux travaillant en région puisque certaines fonctions corporatives de commis se retrouvent tout autant au siège social qu'en région.

Compte tenu de cette situation exceptionnelle où le transfert de compétence constitutionnelle s'accompagne d'un historique particulier de relations de travail et de procédures de malfaite combinées à une révision de l'ensemble des unités de négociation, le

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wished that one of the unions in particular represent them as bargaining agent for either of the units found to be appropriate for collective bargaining at the date that various applications for certification were filed. The Board therefore decided to exercise its discretion and to order that a representation vote be held under section 29(1) of the Code.

All the recognized bargaining agents who filed a certification application to represent employees in either of the units found to be appropriate for collective bargaining may participate in the representation vote of the unit(s). The CSN cannot take part in the representation votes since it has not met the basic representativity requirements established by the Code.

Conseil n'est pas convaincu qu'une majorité d'employés désiraient que l'un ou l'autre des syndicats les représente à titre d'agent négociateur pour l'une ou l'autre des unités jugés habiles à négocier à la date de la présentation des diverses demandes d'accréditation. Le Conseil a donc décidé d'exercer sa discrétion et d'ordonner un scrutin de représentation en vertu du paragraphe 29(1) du Code.

Tous les agents négociateurs reconnus qui ont présenté une demande d'accréditation pour représenter des employés dans l'une ou l'autre des unités jugées habiles à négocier peuvent participer au scrutin de représentation pour cette ou ces unités. Quant à la CSN, elle ne peut participer à ces scrutins, puisqu'elle ne satisfait pas aux exigences minimales prévues au Code en matière de représentativité.

Reasons for decision

Télébec Ltée,

employer,

and

Canadian Telephone Employees' Association;
Teamsters, Brewery, Soft Drink and
Miscellaneous Workers' Union, Local 1999;
International Brotherhood of Electrical
Workers, Local 2365; Communications, Energy
and Paperworkers Union of Canada, Local 81;
and Syndicat des travailleurs et travailleuses de
Télébec-CNTU,

applicant unions and mis-en-cause.

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	555-3901
	555-3902

CCRT/CLRB Decision no. 1133

August 1, 1995

The Board was composed of Ms. Louise Doyon and Ms. Suzanne Handman, Vice-Chairs, and Mr. François Bastien, Member.

Appearances

Mr. Marc Lapointe, assisted by Messrs. François Pinsonnault and Raynald Wilson, for Télébec Ltée;

Mr. Paul Tremblay, assisted by Mr. Jean Lord, president, and Ms. Carmel Brunelle, vice-president, for the International Brotherhood of Electrical Workers, Local 2365;

Mr. Guy Martin, assisted by Messrs. Jacques Morand, union advisor, and Guy Perreault, for the Syndicat des travailleurs et travailleuses de Télébec-CNTU;

Mr. Claude Melançon, assisted by Mr. Robert Pelletier, for the Communications, Energy and Paperworkers Union of Canada, Local 81;

Mr. Luc Martineau, assisted by Ms. Louyse Cadieux, Ms. Grenier and Ms. Brisson (vice-presidents), for the Canadian Telephone Employees' Association;
Mr. Gino Castiglio, assisted by Mr. Robert Bouvier, for the Teamsters, Brewery, Soft Drink and Miscellaneous Workers Union, Local 1999.

I

The Proceedings

These reasons for decision deal with six applications for certification filed with the Board between May 10, 1994 and May 4, 1995, seeking to represent various groups of employees working at Télébec Ltée (Télébec). These applications were filed following the Supreme Court of Canada judgment, rendered on April 26, 1994, which held that labour relations of a local telephone company come under the legislative authority of the Parliament of Canada (Téléphone Guèvremont Inc. v. Quebec (Régie des télécommunications), [1994] 1 S.C.R. 878). All but one of the applicant unions were already bargaining agents certified under the Quebec Labour Code.

The Board consolidated all of the files pursuant to section 15 of its Regulations. It heard the first three applications at public hearings held on September 30, October 26 and 27, December 8 and 9, 1994, February 6, 7 and 8, and March 14, 15, 16 and 17, 1995. The other three applications, which were related, were added to the first three to give the Board an overview of the employer's bargaining structure.

II

The Context

At the outset of the hearings, the parties commented on the impact of the Supreme Court of Canada judgment on Télébec's labour relations and on the Board's jurisdiction to hear the applications for certification. However, none of the parties

challenged the fact that Télébec's labour relations come under federal jurisdiction based on the Supreme Court of Canada's reasoning in Téléphone Guèvremont Inc., supra.

It may be recalled that, in that case, the Court held that a local telephone company, which provides a telecommunication signal carrier service whereby its subscribers send and receive interprovincial and international communications, falls under federal jurisdiction pursuant to sections 92(10)(a) and 91(29) of the Constitution Act, 1867.

Télébec is a telecommunications undertaking that serves approximately 165 000 customers in Quebec in an area of 750 000 square kilometres, extending from James Bay to Îles-de-la-Madeleine. It employs approximately 1080 persons, and its head office is located in Montreal.

Its main activities consist in installing, maintaining, repairing and extending a telephone network in order to provide all its residential and business customers with access to a local and long-distance telephone service as well as a data transmission service. The latter part of the business includes banking services, credit card validation services, and access to various data banks and videoconferencing.

Concurrent with its main role, Télébec sells and leases telephone equipment and leases paging systems (commonly called "pagers") to its customers. It also leases internal communication systems (commonly called "mobile radios") to private companies and very recently invested in a cellular telephone service in the Val-d'Or/Rouyn-Noranda corridor.

Télébec's installations consist primarily of a telephone system composed of central offices, telephone poles, copper cables and fibre optics. Although all its installations are located in the province of Quebec, Télébec offers its customers interprovincial and international telecommunication services by means of an interconnection with Bell

Canada through approximately 30 access points. Thus, as in the case of Téléphone Guèvremont Inc., supra, Télébec offers its customers services that extend beyond provincial boundaries, thereby making Télébec "a link in a chain" that allows subscribers to communicate with the rest of the world. For these reasons, Télébec comes under federal jurisdiction, as the Quebec Court of Appeal explained in Québec (Procureur général) c. Téléphone Guèvremont Inc., [1993] R.J.Q. 77 (C.A.), and as the Supreme Court of Canada affirmed on April 26, 1994 (Téléphone Guèvremont Inc., supra).

All the applications filed with the Board as a result of the transfer of constitutional jurisdiction generated debate between the parties over the appropriateness of maintaining the status quo or redefining the bargaining units established pursuant to provincial certifications. The evidence adduced provided an opportunity to fully examine the history of the company's organizational and operational structure. It allowed us to follow the evolution of the business and, in particular, explained the context in which organizational, structural and technological changes have taken place since the time the provincial certifications were granted, which could affect the determination of the bargaining units. This evidence also revealed ongoing changes that reflect the rapid and constant evolution in the field of telecommunications.

Although we are dealing with the parties' first applications for certification filed under the Canada Labour Code, there is a long history of labour relations behind each application that the Board cannot ignore or underestimate when considering these applications (Alberta Government Telephones Commission (1989), 76 di 172 (CLRB no. 726)). Whether the bargaining structure adopted is the existing one or a completely new one, it must allow the parties concerned to maintain healthy and viable labour relations.

The Applications for Certification

The following is a brief description of each of the six certification applications in the chronological order in which they were filed.

File 555-3752

The first application for certification filed on May 10, 1994 by the Canadian Telephone Employees' Association (CTEA) sought to represent:

"all office employees located in Anjou, Sillery, Dorval and Bécancour."

(translation)

This group was already represented by the CTEA under a provincial certification. A collective agreement was in force from November 5, 1991 until August 7, 1994. On June 17, 1994, the CTEA filed an amended application with the Board seeking an expanded unit comprised of all office employees in the southeast region. At the hearing, the CTEA withdrew this amended application and went back to its original application.

File 555-3754

The second application for certification filed on May 13, 1994 by the Teamsters, Brewery, Soft Drink and Miscellaneous Workers' Union, Local 1999 (the Teamsters), covered:

"all employees of the employer, with the exception of those performing supervisory duties, and excluding office employees"

working in Ville d'Anjou, Dorval and Sillery, in the province of Quebec."

(translation)

By its application, the Teamsters sought to expand the bargaining rights they held under a provincial certificate, which certified them to represent all Télébec employees (office employees and technicians) working in the northwest region. A collective agreement covered these employees from October 16, 1991 to July 31, 1994.

File 555-3773

The Syndicat des travailleurs et travailleuses de Télébec-CNTU (CNTU) filed the next application for certification on June 23, 1994 covering the following employees:

"all employees within the meaning of the Canada Labour Code in Télébec's southeast region at its establishments located at: ..."

(translation)

This union is a new player at Télébec. It has no provincial certification covering Télébec employees.

File 555-3880

On March 15, 1995, during the final week of the hearing, the Communications, Energy and Paperworkers Union of Canada, Local 81 (CEP), filed an application seeking to represent, as certified bargaining agent, the following group:

"all technicians, network manual workers, office and clerical employees, and telephone operators of Télébec Ltée (Mont-Laurier

division) for the establishments located in the geographical and administrative region of Télébec Inc. (Mont-Laurier division)."

(translation)

This group was represented by the CEP under a provincial certification. A collective agreement was in force from December 19, 1991 until November 2, 1994.

Files 555-3901 and 555-3902

On May 4, 1995, the International Brotherhood of Electrical Workers, Local 2365 (IBEW), filed two applications for certification seeking to represent the following groups of employees it already represented provincially:

"all employees, within the meaning of the Code, of the network group, including central office employees, installation, repair, maintenance, and service employees, linemen, cable splicers, storespersons, assignment and test clerks, dispatchers and maintenance employees for the establishments located in Parent, La Tuque, Bécancour, Disraëli, Arthabaska, Princeville, Château-Richer, Saint-Sébastien, Venise-en-Québec, Îles-de-la-Madeleine, Fermont, Schefferville, Saint-Thomas-d'Aquin and La Guadeloupe."

(555-3901; translation)

"all service, traffic and office employees for the establishments located in La Tuque, Îles-de-la-Madeleine, Arthabaska, Saint-Thomas-d'Aquin and Bécancour."

(555-3902; translation)

The collective agreements covering these two groups expired on the same date, namely December 31, 1994.

In short, the CTEA, the CEP and the IBEW are asking that the Board grant them certified bargaining agent status for the same units they already represent. The Teamsters, on the other hand, are seeking to enlarge their unit in the northwest region to include all other Télébec employees, with the exception of those who work at Dorval and Anjou. They are thus seeking to represent employees who are now represented by all the other bargaining agents, with the exception of the CTEA. Finally, the CNTU is seeking to represent the employees in the southeast region who are now represented by the IBEW, the CTEA and the CEP.

In response to the various applications for certification, the employer stated that it can live with the current bargaining structure, if the Board considers the units appropriate. However, it suggested that the Board choose the most appropriate structure in the circumstances because it is not a matter, in this case, of promoting access to collective bargaining given that the employees are already represented by bargaining agents. The employer proposed a bargaining structure consisting of three separate units: (1) a unit consisting of all technicians working in network operations; (2) a unit consisting of all office employees, with the exception of office employees working in Anjou and Dorval; and (3) a unit consisting of office employees working in Anjou and Dorval.

The six certification applications are timely under the Code. The Board already decided, on October 14, 1994, that the first three applications were filed within the time limits provided in the Code (Télébec Ltée, October 14, 1994 (LD 1362)), and the same is true of the other three applications filed during and after the hearings. The latter three applications comply with the time limits provided in section 24(2)(c) of the Code.

Consequently, the Board considers that the six applications were properly filed and that it has the constitutional jurisdiction to deal with them.

III

The questions which the Board must decide in the present case are the following.

Determination of the Bargaining Units

The Board must determine whether it is appropriate at this time to redefine the existing bargaining units or whether it is preferable to maintain the status quo until the various technological and operational changes that Télébec may eventually undergo are more clearly defined.

Representative Character

In the event that the Board redefines the bargaining units, it will have to decide how the employees' wishes will be assessed. The Board will ask itself whether, as requested by the majority of the unions, it is appropriate to allow the employees to choose their bargaining agent by means of a representation vote.

IV

The Board heard abundant evidence, but the facts which are essential to determining these files are as follows.

General History of the Business and of the Bargaining Structure

Created in May 1969, Télébec was the product of Bell Canada amalgamating eight businesses, i.e. Télébec Inc., Téléphone de Princeville Ltée, Téléphone Contrecoeur Ltée, Compagnie de téléphone de La Tuque, Télécommunications de l'Est Ltée, Compagnie de téléphone de Pontiac Ltée, Compagnie de téléphone d'Arthabaska Ltée and Télécommunications Richelieu Ltée. It subsequently acquired a number of

businesses, the two largest being Compagnie de téléphone de Disraëli and Compagnie de téléphone de la Vallée de la Lièvre de Mont-Laurier. In 1976, Télébec merged its operations with Téléphone du Nord de Québec, and a few years later, it acquired Compagnie de téléphone Ungava and Compagnie de téléphone Continental Ltée. Finally, in 1985, it incorporated into its business one of its former subsidiaries, SOTEL Inc. Télébec is wholly owned by the BCE Inc. group.

The chronology of these mergers and acquisitions is reflected in the various certifications granted to unions to represent Télébec employees. As a result of the mergers, some bargaining rights were simply transferred to the IBEW from Téléphone de la Tuque or to the CEP from Téléphone du Nord de Québec, among others. The IBEW was subsequently certified to represent all employees of the network group and clerical employees in Îles-de-la-Madeleine and Trois-Rivières, and the CTEA was certified to represent the Montreal and Quebec office employees and the clerical employees working in the line plans and specifications (LPS) group in Trois-Rivières.

In 1977, the picture was as follows. The IBEW represented technicians and office employees in what was then commonly called the southeast region; the CEP represented all employees in the region then known as the northwest; and the CTEA was the bargaining agent for technicians and office employees in the Mont-Laurier division, office employees in Quebec and Montreal, and LPS clerical employees in Trois-Rivières.

Subsequently, there were raids and mergers. The CEP ousted the CTEA in the Mont-Laurier region and the Teamsters ousted the CEP in Abitibi. In 1980, the IBEW consolidated its various certification certificates covering office employees, and the CTEA consolidated the certification covering office employees in Montreal and Quebec with the certification covering the LPS clerical employees in Trois-Rivières. Finally, the former employees of Compagnie de téléphone Ungava and SOTEL were

added to the IBEW (network group) and Teamster certification certificates respectively, after Télébec acquired these companies.

At the time the certification applications were filed, the CTEA represented some 215 office employees in Anjou, Sillery, Dorval and Bécancour; the CEP represented approximately 40 technicians and office employees in the Mont-Laurier division; the Teamsters represented some 350 technicians and office employees working in the northwest region; and the IBEW, under two certification certificates, represented some 110 technicians and 95 office employees working at various establishments in the southeast region.

Following the transfer of constitutional jurisdiction, Télébec and the various bargaining agents agreed to maintain the existing terms and conditions of employment until the collective agreements were renewed.

Evolution of the Corporate Organizational Structure

Following its merger with Téléphone du Nord de Québec Inc. in 1976, Télébec's operational structure has consisted of two administrative geographical units: the southeast division, comprised of Îles-de-la-Madeleine, and the St. Lawrence, Mont-Laurier, La Tuque and Pontiac regions, and the northwest division, composed of the Témiscamingue, Chibougamau, James Bay and Laforge regions.

Each region had its own senior management, its own line structure and its own files. Line plans and specifications were prepared locally, based on local criteria. The general managers for the northwest region were located in Val-d'Or, while the general managers for the southeast region were based in Montreal. Mr. Raynald Wilson, labour relations manager, explained that this structure created a certain competitiveness between identical services in the two regions. The fact that each senior management had its own objectives created obstacles in terms of employee

mobility. In cases where it was more cost effective to carry out a certain project in one region, employees from the other region were not allowed to work on the project because the output of the designated region would then decline, to the advantage of the other region.

In January 1993, Télébec decided to alter this structure and replace the geographical southeast and northwest administrative divisions with a more unified management structure. Télébec therefore combined in a single network control centre (NCC) the existing ones located at Bécancour and Val-d'Or, which were responsible for installing, maintaining and replacing telephone equipment. The NCC, located in Val-d'Or, began serving the entire network in March 1995. New technology now makes it possible to transmit to technicians, wherever they are located, all relevant information needed to solve customers' problems throughout the territory served by Télébec. Furthermore, Télébec intends to combine the work control centres responsible for installing poles and cables. This centre or work group, referred to as the "line work group," will be located in Bécancour.

Moreover, in 1993, Télébec introduced a computerized customer files system (INFOCOM), which compiles all useful information on customers and makes it available to all its employees, wherever they work. Télébec can thus offer its clientele continuous service because the employees in each region can work in rotation and handle customer inquiries throughout the territory on weekends and in the evenings.

In September 1994, in order to further improve its operation, Télébec instituted a major corporate reorganization using processes-based management. This reorganization was deemed necessary in order to maximize operational efficiency in the context of an evolving telecommunications industry, to bring the company's structures more in line with its management processes, and to continue its cost-reduction efforts.

The new organizational structure now consists of the company's various functions under the following seven branches:

- (1) Comptroller-Treasurer,
- (2) Processes, Systems and Methods,
- (3) Planning and Market Development,
- (4) Network Engineering,
- (5) Corporate Affairs,
- (6) Network Operations, and
- (7) Sales and Customer Service.

The first five branches have a corporate function, whereas the last two are concerned with operations. All general managers report to the president and work in the Montreal region. Each general manager is responsible for a department comprised of several units, and each unit in turn consists of a number of groups for which the first-line managers are responsible. Generally speaking, most employees of the first five branches work in Anjou and Dorval, while the employees of the remaining two operational branches tend to be spread throughout the territory served by Télébec.

Technological Change

In the telecommunications industry, rapid and constantly evolving technological change has had, and will continue to have, repercussions on the work-force of all companies operating in this sector, including Télébec.

In terms of competition, Télébec still held, as of the date of these hearings, a monopoly on long-distance service; however, the CRTC is considering this matter in the wake of its decision to meet with Canada's various independent telephone companies to conduct a separate study in order to establish a regulatory structure that will meet their specific needs.

On the question of modernization, Télébec implemented a full rural development (FRD) program to eliminate party lines in certain regions. This program is scheduled for completion toward the end of 1995 and, as Raynald Wilson explained, the volume of work of those employees assigned to this project will be affected. Télébec will then have to develop new markets in order to maintain the level of employment of these employees.

The same applies to the central office equipment modernization program (COEMP) that began in 1985. This program, which is 74% completed, has already required the transfer of certain employees to other jobs within the company.

Similarly, the modernization of computer technologies now enables Télébec, as we have seen, to centralize the files of all its customers in the territory it serves using the INFOCOM software, thereby facilitating the centralization of its network maintenance operations (NCC) and its infrastructure projects (work centres).

Numerous other examples could be given, but we need only note that increased competition in the telecommunications industry, increasing computerization of operations, the development of new technologies (for example, the cellular telephone, information highway) and the new partnerships this may produce with cable companies are all changes which Télébec will have to face.

V

The Bargaining Units

The Grounds for Intervention

The Board must first determine whether the existing bargaining units should be maintained. Essentially two types of arguments were advanced by those favouring the status quo. These arguments can be summarized as follows. First, the existing units

have proven their worth because their configuration has not caused Télébec any major or fundamental problems with respect to labour relations. Moreover, no formal proof was adduced that these units are not viable. Second, these units should be maintained because it is not possible, at this stage, to define new ones that could withstand the impact of the countless changes that are now occurring in the telecommunications industry. In other words, why build a new structure today that the winds of change could destroy tomorrow. Until the shape of the future is somewhat more clearly defined, it would be better to retain a convoluted, yet familiar structure.

While both arguments favour maintaining the status quo, they differ markedly with respect to the configuration of the units. According to the first argument, the existing units make sense only in relation to the business itself and its history of multiple acquisitions. In other words, the current patchwork of units at Télébec is purely and simply the product of this historical evolution. This means that it derives few, if any, of its characteristics from the telecommunications industry and, in short, is even very different from the industry.

The second argument, on the contrary, is based on the dramatic changes that are presently sweeping the telecommunications industry and that are likely to profoundly change it. Why attempt to create new bargaining units when Télébec's role and strategic orientations continue to depend on the profound changes that may radically alter the nature and even the very face of the industry? According to this argument, the redefinition of the units depends first and foremost on the restructuring of the telecommunications industry.

From a Board perspective, the question of redefining units is generally viewed in a different light. It is first and foremost considered in the context of the fundamental objectives of the Code that are fulfilled with regard to a given employer. This question is also influenced by a host of factors whose importance depends on the characteristics of the business, its employees and, of course, the industry in which it operates. The

present context, in which at least two of the certification applications raise questions of the structure of the units and of the appropriateness of each unit, increases the need to consider both the realities of the business and its particular environment before deciding the merits of reviewing the existing units.

These applications affect all the employees who have long had access to collective bargaining, first under provincial certifications and now under the system of voluntary recognition (Cable TV Limited (1979), 35 di 28; [1980] 2 Can LRBR 381; and 80 CLLC 16,019 (CLRB no. 188); Emde Trucking Ltd. (1985), 60 di 66; and 10 CLRBR (NS) 1 (CLRB no. 501); Brewster Transport Company Limited (1986), 66 di 1; 13 CLRBR (NS) 339; and 86 CLLC 16,040 (CLRB no. 574); Bill White et al. (1993), 92 di 18 (CLRB no. 1011); and Ontario Hydro (1994), 94 di 60; and 25 CLRBR (2d) 154 (CLRB no. 1065)). Although obvious, this fact is nevertheless important because it puts a particular face on all the factors the Board must take into account when redefining an appropriate unit or a structure of appropriate units. The objectives of the Code admittedly do not change whether we are dealing with the creation of one or more new units or with the reorganization of existing units: in any case, the objective is to encourage the signing of a collective agreement to provide a framework for collective labour relations.

In that sense, the Board's role is to provide, through the structure of bargaining units, an institutional framework within which bargaining can take place and which most accurately reflects the situation of the parties, having regard to the result sought.

It stands to reason that this task differs somewhat, depending on whether one is starting from scratch or whether there are already existing units. The emphasis will be, in the first case, on access to the collective bargaining process, and in the latter case, on the proper functioning of the structure (Island Medical Laboratories Ltd., no. B308/93, September 21, 1993 (BCLRB)). In the present case, this distinction is also

highlighted by the argument of certain parties that the Board's role should be limited to defining appropriate units and not the most appropriate units.

It is true that when the Board considers an application for certification, it does not have to determine the most appropriate unit. This does not mean, however, that all units are equally appropriate, particularly where access to unionization is not at issue, as is the case here. If this were the case, the Board's exclusive jurisdiction to determine the appropriateness of units would have no real substance or effect. When dealing with one or more certification applications, the Board must assess the appropriateness of a unit, or a configuration of bargaining units, having regard to the fundamental objectives of the Code and the particular corporate structure into which this unit or these units must fit and develop.

Télébec's particular structure is that of an organization that very recently adopted a unified corporate personality with the disappearance of its biregional organizational structure and is now in the middle of technological and regulatory changes that are profoundly affecting the telecommunications industry. The assessment of the appropriateness of the existing units, which are the product of Télébec's creation from numerous acquisitions of small telephone companies, must therefore be based more on Télébec's present situation than on its past or future.

In that sense, the main purpose of this exercise is not to put the existing units on trial, but rather to try to inject more rationality into a bargaining structure that essentially reflects a very particular historical evolution. Conversely, it would be difficult for the Board to use the changes that could occur in the industry as a pretext for refusing to examine the appropriateness of the proposed units at this time.

A brief look at the particular situation of the business and the characteristics of its unionized work-force quickly reveals how the current structure differs in many respects from the more rationale structure that was just mentioned.

The Board first notes that a number of bargaining agents represent the same employee categories, in the case of both technicians and clerical employees. More specifically, three of the five existing units include technicians and four include office employees. As we have seen, this multiplicity of bargaining units and bargaining agents for identical types of positions is the product of the historical evolution and economic circumstances and has never been the subject of a global review.

The Board also notes that the terms and conditions of employment contained in the collective agreements for the same types of positions are very similar, if not identical. The wording may vary greatly from one agreement to another, but the general picture that emerges is that these terms and conditions do not differ substantially on the more important questions, such as rates of pay, travel allowances, hours of work, etc. This general picture reveals numerous instances of overlapping between units, at least in terms of positions affected, and the working conditions involved. If the *raison d'être* for this situation is evident, its justification in terms of labour relations is far less apparent.

Admittedly, the evidence did not reveal that managing this multiplicity of units poses problems that compromise industrial peace within the business. The history of labour relations, and in particular the relative absence of disputes in recent years, in no way supports a clear finding that the current bargaining structure is a failure. This assessment, however, applies to a time and to circumstances that have since changed significantly, as the facts have highlighted.

One need only recall the disappearance of the company's geographic structure, the major change to the regulatory framework in which it operates and the profound impact of technological change on its management processes and its employment structure to realize the extent to which the requirement of dealing with various bargaining agents for the same types of positions could make the process extremely cumbersome. Moreover, the testimony of the labour relations manager, Raynald

Wilson, revealed that if the management of labour relations according to the existing model proceeded without too many glitches, this structure nevertheless required an enormous amount of time and attention in order to ensure that union jurisdictions and sensibilities were taken care of.

In short, the Board believes that the best way of dealing with these applications for certification is to review the general bargaining structure at Télébec. These applications take place in a very specific context, namely, the transfer of constitutional jurisdiction. In this regard, the prior existence of bargaining units at Télébec is one of a number of facts of which the Board is aware. We should point out, however, that the configuration of these units does not create a particular presumption regarding the Board's determination of appropriate units, although it is one of the factors that enter into this determination (Alberta Government Telephones Commission, *supra*).

The Bargaining Structure

The principles and criteria that the Board applies in determining the configuration of appropriate units are well known and do not have to be reviewed in detail. Suffice it to recall the most important ones.

(a) Bargaining units are described in generic terms, except for unusual cases (Teleglobe Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 1989)).

(b) The creation of large units is preferable to avoid fragmentation or proliferation of smaller units (Canada Post Corporation (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675); and Canadian Broadcasting Corporation (1991), 84 di 1 (CLRB no. 846)). This preference stems from a number of factors: administrative efficiency, a simple bargaining structure, lateral mobility of employees, a common system of working conditions and

industrial stability (AirBC Limited (1990), 81 di 1; 13 CLRBR (2d) 276; and 90 CLLC 16,035 (CLRB no. 797), pages 6; 280-281; and 14,295).

(c) When an appropriate unit exists, employees can exercise their rights under the Code and businesses can operate smoothly. In other words, the community of interest that constitutes the basis on which rests employee rights must also take into account the structural, administrative and operational reality of the business (Canada Post Corporation, *supra*, pages 90-91; and 151-154; Canadian Museum of Civilization (1992), 87 di 185; and 92 CLLC 16,045 (CLRB no. 928), pages 197; and 14,359).

It is against this background that the Board must now answer the following question: what structure can best reflect the elements that make up the community of interest. It is apparent from the foregoing that two reference points are used in defining this notion: the existing administrative and operational structure resulting from the recent changes, and the impact of technological change on the business and its work-force. To put it simply, this means that the protection of employees that in theory union representation must ensure, and in particular job security, is a critical factor in an industry that is evolving as rapidly as the telecommunications industry. The configuration of the units at Télébec must therefore reflect this key requirement. It is not hard to imagine that job security would be better served by providing employees with employment options and opportunities that cover all positions of the same type than if it is restricted to geographic areas that no longer reflect the company's organizational and operational reality.

The evidence in this regard speaks volumes. It reveals a real change in the employment structure at Télébec and changes which, although not all of the same magnitude, will accelerate in the immediate future. Télébec's development plan shows a significant migration of employees from positions whose numbers are decreasing to positions whose numbers are increasing. While the sales, informatics and market

development sectors will expand, those associated with network maintenance and the present accounting system will decrease. Even though it is estimated that these changes will not result in job losses, at least in the case of permanent jobs, they will certainly result in increased work-force mobility and training-related needs.

Other factors will increase the mobility of the company's work-force, such as the recent implementation of the NCC in Val-d'Or, and the planned centralization of major projects in Bécancour. The Board notes, for example, that the centralization of all NCC activities in Val-d'Or has resulted in the disappearance of some 20 positions in Bécancour.

The nature and extent of these changes have led the company to set up various programs in order to minimize their impact on permanent employees. For example, Télébec developed a reorientation program which enables employees to be transferred voluntarily from areas where the number of positions is declining to areas where the number of positions is increasing. Following discussions with the unions, jurisdictional barriers were partially lifted to allow for the implementation of this program. However, some restrictions remain with respect to the period during which employees must remain members of their original union following their transfer. Needless to say, the complexity of these negotiations is directly proportional to the number of bargaining agents representing the same employee categories. Moreover, a voluntary program of shorter hours of work has been implemented to counter the effects of the position cuts which are scheduled for 1995.

However, this work-force mobility is not being applied only with respect to the elimination of positions. It also applies to new positions that are created or transformed as a result of changes in customer needs or technological changes. The same union jurisdictional obstacles, although not insurmountable, arise during classification and staffing of these positions. For example, a new supply officer position in the LPS group was evaluated and identified as an office employee position;

however, since that position was found at three different locations in the network, Télébec had to negotiate the salary with all bargaining agents that represented incumbents of this new position.

In short, the decrease in the number of positions and the changes to the job structure show that the question of job security will remain in the coming years. This means that the new bargaining units will have to be broad enough in scope to allow work-force realignments and adjustments that better reflect employee needs.

What configuration would then make it possible to reconcile both these undeniable requirements of work-force mobility and those of the company's structural, administrative and operational reality?

The Board notes first that the technicians and office employees do not share the same community of interest. The former are required to travel constantly to serve customers, whereas the latter occupy largely office-based positions. As a result, their working conditions and specific career paths are very different. According to the Board, a single bargaining unit consisting of all technicians meets all the criteria of a unit appropriate for collective bargaining.

The situation with respect to the office employees is not as clear because certain applications seek to create two separate units: one for the employees working at the company's head office (Anjou and Dorval), and another for those employees working in the regions. The basic problem that the duplication of such a unit poses for the Board pertains to the precise boundaries of such a unit. As counsel for the CTEA went to great lengths to emphasize in his arguments, and rightly so, the so-called administrative functions by no means adequately correspond to the geographic area where they are performed. For example, the position of clerk in Corporate Affairs, Network Engineering and Processes, Systems and Methods is found both in Anjou and

Dorval and in the regions. What criterion should determine whether this position is included in or excluded from one or the other of the proposed units?

Moreover, the evidence reveals that most of the differences between the two groups of office employees are attributable to conditions that are extraneous to employment, i.e. the different lifestyles of the employees in Anjou and in the regions, which translates in a greater need for compressed or flexible working hours. Besides the fact that the Dorval and Anjou group is not the only one that benefits from this system, it is sufficient to note that these factors would not significantly diminish the occupational similarities and the community of interest existing in the office employee unit, regardless of where the employees work. For these reasons, the Board believes that a unit consisting of all office employees working for the company is appropriate.

In summary, the units that the Board deems appropriate are the following:

(a) a unit consisting of all technicians, excluding those performing supervisory duties and those above;

(b) a unit consisting of all office employees, excluding those performing supervisory duties and those above.

VI

Representative Character

After having decided that two units are appropriate, the Board must now determine how to assess the wishes of the employees included in these units for the purposes of certifying a bargaining agent for each unit.

The rules governing the representative character of unions are contained in sections 28 and 29 of the Code and sections 23 and 24 of Board's Regulations. Over the years,

the Board has interpreted and applied these provisions in respect of various types of applications, whether a first application for certification, an application for certification resulting from raiding in order to supplant a bargaining agent, or various types of applications for review filed pursuant to section 18 of the Code.

At the outset of the hearings, a question was raised as to how the principles enunciated by the Board in various decisions, in particular in Teleglobe Canada, supra, would be applied in the present files when assessing a union's representative character. In their preliminary submissions, some parties mentioned that the application of these principles sometimes creates uncertainties and problems. They therefore asked that the Board take advantage of this opportunity to clarify and, if necessary, review certain elements of this policy.

In order to decide how to assess the representative character of the unions involved, the Board considered the nature and characteristics of these certification applications and, in particular, the legal context existing at the time they were filed. This examination led the Board to conclude that the present situation is an exceptional one that it must take into account in its decision regarding the representative character.

The Board paid particular attention to the following elements.

. This is the first time that certification applications to represent Télébec employees have been filed under the Canada Labour Code. As we know, the applications were made following the transfer of constitutional jurisdiction resulting from the Supreme Court of Canada judgment in Téléphone Guèvremont Inc., supra. All unions, with the exception of the CNTU, recently acquired the status of recognized bargaining agent under the Code, although they have represented the employer's employees and negotiated on their behalf for a number of years.

. The CTEA, the CEP and the IBEW are not asking that new bargaining units be defined, but instead are seeking the status of certified bargaining agent for the units they already represent. In that sense, given the circumstances of this case, the applications filed by these unions appear, in some respects, to be protective measures.

. The Teamsters are seeking to add employees to the bargaining unit they already represent who are not covered by the intended scope of their certification order. However, these employees occupy positions that are similar to those already included in this unit and that are now divided among a number of bargaining units.

. The CNTU is asking to be certified to represent a bargaining unit consisting of the employees working in the southeast region. These employees are now included in a number of bargaining units. The unit sought in this application is identical to the unit in the so-called northwest region, which the Teamsters have represented for several years.

. In their applications, the Teamsters and the CNTU are both seeking to represent bargaining units that are different from the existing units. At first glance, these applications, in a number of respects, resemble review applications, or more precisely, combined raiding and review applications. However, these applications cannot be characterized outright as such because the Board, never having certified a union to represent Télébec employees, has no past decision that it can review or amend pursuant to section 18 of the Code (see Canadian National Railway Company (1992), 88 di 139 (CLRB no. 945); Canadian Pacific Limited (1992), 88 di 126 (CLRB no. 944); Canada Post Corporation, *supra*; Canadian Broadcasting Corporation, *supra*; and Purolator Courier Ltd. (1993), 91 di 149 (CLRB no. 1003)).

. The employer, from a procedural perspective, cannot ask the Board at this time to make changes to the bargaining structure at Télébec. At the moment, the only procedural means available is the certification application; the review application is

not yet available. Télébec therefore finds itself in a situation where, unlike other employers already subject to the Code, it cannot apply to the Board for a review of its bargaining structure. It has therefore proposed a review of the structure of the units in response to the various certification applications.

. The bargaining units and the scope of the unions' bargaining rights have evolved, except in a few cases, in tandem with the mergers and sales of businesses that led to the creation of Télébec as it exists today. These corporate changes have resulted in the gradual establishment of a number of bargaining units consisting of employees who perform similar tasks and are represented by several bargaining agents; these units continue to exist side by side in a constantly evolving organizational and administrative structure. This bargaining structure has never been the subject of any debate or major disputes between the parties, nor has it been the subject of a global review like the present one, which affects all parties. In fact, the present situation gives the impression that the unions have acquired what some might consider a form of vested rights.

. This factual and legal situation is now being called into question. It led all recognized bargaining agents to express their wish to continue to represent the employer's employees in the new legal context resulting from the transfer of constitutional jurisdiction. Therefore, they all filed applications for certification. However, not one of these applications is supported by membership evidence obtained shortly before the unions filed their respective applications. In fact, all unions rely on their established representative character, obtained either through memberships taken out long ago, in circumstances different from those of the present applications, or through the operation of union security clauses contained in collective agreements. As for the CNTU, it recruited new members from among the employees working in the southeast region.

The current debate over redefining the bargaining units reflects the fact that for the first time this question is being considered as a whole at Télébec. Moreover, it is taking place in a very specific procedural context in which the certification application is the only means whereby the Board can exercise its jurisdiction to define bargaining units, and the parties and employees can be heard on the matter. The Board took this exceptional situation into account when it decided to intervene and redefine the bargaining units. This situation is no less exceptional when determining the procedures for assessing the unions' representative character.

This is the reason why the Board, after reviewing the file, the evidence and the provisions of the Code and Regulations dealing with representative character, decided that it is not satisfied, as it must be under section 28(c) of the Code, that, as of the date of the filing of the certification applications, a majority of employees in either unit deemed appropriate wished to be represented by one of the unions. In fact, the Board cannot ascertain, on the basis of membership cards or other relevant evidence, that a majority of employees expressed their wishes in this case. In this regard, the file reveals that some employees changed union allegiance more than once during the period prior to the filing of the first applications in June 1994 and since the hearings ended in March 1995.

The Board has therefore decided to exercise the discretion conferred by section 29(1) of the Code and order a representation vote for each of the two units deemed appropriate for collective bargaining. This provision reads as follows:

"29.(1) The Board may, in any case, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit."

As the Board explained in CJMS Radio Montréal (Québec) Limitée (1978), 33 di 393; and [1980] 1 Can LRBR 270 (CLRB no. 151), regarding the meaning to be given to this provision:

"It is therefore clear that the Board has the power to order that a vote be taken at any time. ..."

(pages 397; and 273)

The Board, however, has had few opportunities to exercise its discretion under section 29(1) and to explain its approach regarding this matter.

The general rule has been well established in Board decisions, namely that membership cards produced in virtue of sections 23 and 24 of the Regulations are used by the Board to satisfy itself, as of the date the certification application is filed, of majority support for a union in accordance with section 28(c) of the Code. Consequently, the Board only orders a vote pursuant to section 29(1) where special or unusual circumstances warrant it. It has thus considered cases involving raiding, allegations of unfair labour practices disputing union membership evidence, or a long delay between the date of the certification application and the date of the Board's decision, as situations warranting a representation vote. (With respect to the Board's general approach regarding this matter, see CJMS Radio Montréal (Québec) Limitée, supra; and Murray Bay Marine Terminal Inc. (1983), 50 di 163 (CLRB no. 401).)

In addition to these situations, there are those of an exceptional nature that constitute more or less unique cases where the only effective means of ascertaining the employees' wishes is the secret ballot.

This is the case here where the transfer of constitutional jurisdiction triggered a series of actions and reactions, all occurring in a particular historical context of collective bargaining which the Board described earlier. This is one of the situations covered by

section 29(1) of the Code, where the Board is justified in holding a vote to determine whether the employees wish to be represented by one of the applicant unions. Added to this is the Board's decision to restructure the bargaining units, because if some unions are strongly represented in one employee category, region or a part thereof, that is not the case with respect to other employee categories, regions or parts thereof. This factor is of particular importance here, given the configuration of the organizational structure that gave rise to this situation.

This is the reason why the Board decided that all bargaining agents that now represent employees in one of the units deemed appropriate and that filed a certification application may participate in the representation vote for one of the units or both units. Although the present situation is not identical to that in Canadian Broadcasting Corporation (1978), 27 di 765; and [1979] 2 Can LRBR 41 (CLRB no. 138), insofar as the recognized bargaining agents are also applicants for certification, the Board feels that the rule which states that "if the employees are already represented, they must be able to consider the incumbent union when making their choice" (pages 782; and 55) applies here. Unlike the situation in the above-mentioned case, the results of the representation votes will enable the Board in the present case to certify the recognized bargaining agent that attains the representative character required for a given unit, since each bargaining agent filed a certification application. With regard to the CNTU, which presently has no representation rights and does not meet the Code's minimum requirements with respect to the representative character for any of the bargaining units, the Board finds that it cannot be included on the ballot.

The decision to hold representation votes meets the request made at the hearing by the majority of the bargaining agents that the Board order representation votes, should it decide to define new bargaining units.

Thus, the employees, who were previously divided among five different bargaining units, of which three included technicians and four included office employees, will

have the opportunity to choose the bargaining agent that will represent them in the future.

The present decision addresses a special situation, as we have seen, not only because of the circumstances that gave rise to the certification applications, but also because of the important changes for the employees concerned. In the Board's opinion, this decision is, in the present circumstances, one that will enable it to ascertain the wishes of the majority of the employees, and at the same time offer the best guarantee that conditions that are conducive to sound labour relations are established.

In the light of this decision, it is neither necessary nor appropriate in the present case for the Board to review or clarify certain aspects of its policy regarding representative character, which in the opinion of certain parties may sometimes, and in specific circumstances, pose a problem.

The Board determined that the eligible employees are those employees who were working for the employer on May 4, 1995, when the IBEW's applications, the last in the series of applications filed, were received, and who are still working for the employer on the date the vote is held. Moreover, should one of the unions decide not to participate in the representation votes, it must inform the Board within ten days of the date of this decision.

If no union obtains a majority, the Board will remove from the ballot the name of the union with the least support among the employees and will repeat this procedure until a union obtains a majority.

VII

FOR THESE REASONS, the Board;

DECIDES that two bargaining units are appropriate for collective bargaining: one consisting of technicians and the other consisting of office employees.

ORDERS a representation vote for each of these units in which all unions that filed a certification application to represent employees in one of these units may participate. Affected employees who were working for Télébec on May 4, 1995 and who are still working for this employer on the date the vote is held will have the right to participate.

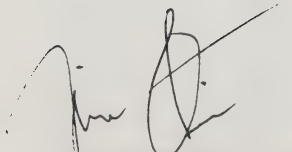
The Board appoints Mr. Jean Gosselin, senior labour relations officer, to act as returning officer.

The Board reserves the right to intervene at the request of one of the parties in order to settle disputes arising from the implementation of the present decision and to make any further appropriate order.

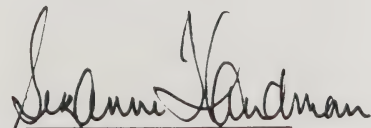
This is an interim decision within the meaning of section 20(1) of the Code.



Louise Doyon
Vice-Chair



François Bastien
Member



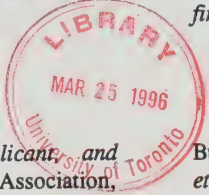
Suzanne Handman
Vice-Chair

Information

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Summary

Résumé

Bunge of Canada Ltd., *applicants*, and International Longshoremen's Association, Local 1739, Canadian Union of Public Employees, Local 3571, *certified bargaining agents*, and Maritime Employers Association, Quebec Stevedoring Co. Ltd., Logistec Stevedoring Inc., Albert G. Baker Ltée, Termino Corporation, Federal Marine Terminals Ltd. Reliance Marine Terminals Ltd., Compagnie d'Amarrage de Québec, Ceres Corporation Inc., International Longshoremen's Association, Local 1605, and Canadian Union of Public Employees, Local 3711, *mis-en-cause*.

Bunge du Canada Limitée, *requérant*, et Association internationale des débardeurs, section locale 1739, Syndicat canadien de la fonction publique, section locale 3571, *agents négociateurs accrédités*, et Association des employeurs maritimes, Compagnie d'Arrimage de Québec Ltée, Logistec Arrimage Inc., Albert G. Baker Ltée, Termino Corporation, Terminus maritimes fédéraux, Terminus maritimes Reliance Ltée, Compagnie d'Amarrage de Québec, Ceres Corporation Inc., Association internationale des débardeurs, section locale 1605, et Syndicat canadien de la Fonction publique, section locale 3711, *mis en cause*.

Board File: 530-2338

Dossier du Conseil: 530-2338

CCRT/CLRB Decision no. 1134
July 31, 1995

CCRT/CCRT Décision n° 1134
le 31 juillet 1995

Bunge du Canada Limitée filed an application for review under section 18 of the Code seeking to amend the certification order held by the Canadian Union of Public Employees, Local 3751, to include all employees working at the grain terminal operated by Bunge in the Port of Québec. More specifically, Bunge wants the Board to include in the unit all employees engaged in the loading of ocean-going vessels. These employees are presently covered by the geographical certification order held by the International Longshoremen's Association, Local 1739.

Le Conseil est saisi d'une demande de révision présentée par Bunge du Canada Limitée en vertu de l'article 18 du Code visant à faire modifier l'ordonnance d'accréditation détenue par le Syndicat canadien de la fonction publique, section locale 3751, pour représenter tous les employés travaillant aux activités du terminal céréalier que Bunge exploite au Port de Québec. En particulier, Bunge demande au Conseil d'y inclure les employés affectés au chargement des navires océaniques et qui sont actuellement visés par l'ordonnance d'accréditation géographique accordée à l'Association internationale des débardeurs, section locale 1739.

This application incidentally affects the existing collective bargaining structure for the longshoring industry in the Port of Quebec. For this reason, the Board decided to give mis-en-cause status to all employers covered by the geographical certification order in the Port of Quebec.

Bunge did not establish any new facts or special circumstances which would warrant the Board's intervention to modify the conditions under which the collective representation of Bunge employees and of longshoremen working in the Port of Quebec is achieved. Bunge's decision to engage in ocean-going longshoring in 1987 does not constitute in itself a new fact which would justify a review of the bargaining structure.

The other reasons raised by Bunge in support of its application, particularly the increase of labour costs generated by the employment of longshoremen to load the ocean-going vessels, the workcall timeframe requirements, and the adverse effect on its competitive position were not made out. The Board found no substantial reasons that would justify the modification of the bargaining unit held by CUPE and the consequent fragmentation of the geographical unit of the longshoremen in the Port of Quebec.

Cette demande vise de façon incidente la modification de la structure actuelle des unités de négociation dans le secteur du débardage dans le Port de Québec. Pour cette raison, le Conseil a mis en cause tous les employeurs visés par l'ordonnance d'accréditation géographique du Port de Québec.

Bunge n'a pas établi de faits nouveaux ou de circonstances particulières qui justifieraient l'intervention du Conseil et la révision des modalités de représentation collective des employés de Bunge et des débardeurs travaillant dans le Port de Québec. La décision de s'engager dans le débardage océanique en 1987 ne constitue pas en soi un fait nouveau de nature à justifier une révision de la structure de négociation.

Les autres motifs invoqués par Bunge pour appuyer sa demande, notamment les coûts additionnels de main-d'œuvre qui seraient engendrés par l'utilisation de débardeurs pour le chargement de navires océaniques, les délais à respecter pour l'appel au travail des débardeurs, et sa situation concurrentielle défavorable n'ont pas été démontrés. Le Conseil a décidé qu'il n'y a pas de facteurs significatifs qui justifient la modification de l'unité de négociation du SCFP et, de façon incidente la scission de l'unité de négociation géographique des débardeurs dans le Port de Québec.

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Reasons for decision

Bunge of Canada Limited,

applicant,

and

International Longshoremen's Association,
Local 1739; and Canadian Union of Public
Employees, Local 3571,

certified bargaining agents,

and

Maritime Employers' Association; Quebec
Stevedoring Co. Ltd.; Logistec Stevedoring
Inc.; Albert G. Baker Ltd.; Termino
Corporation; Federal Marine Terminals;
Reliance Marine Terminals Ltd.; Compagnie
d'Amarrage de Québec; Ceres Corporation Inc.;
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mis-en-cause.

Board File: 530-2338
CCRT/CLRB Decision no. 1134
July 31, 1995

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Mr. François Bastien and Ms. Sarah E. FitzGerald, Members. Hearings were held on December 6 and 7, 1994, February 14, 15, 16 and 17 and April 3, 4, 5, 6, and 7, 1995, at Montréal.

Appearances

Mr. Jean-Pierre Belhumeur, accompanied by Mr. Jean-Guy St-Onge, president, for
Bunge Canada Limited;

Mr. Alain Pilotte, for Logistec Stevedoring Inc., Termino Corporation and Albert G.
Baker Ltd.;

Mr. Gérard Rochon, accompanied by Mr. Michel Gagnon, for the MEA and Federal Marine Terminals, FEDNAV Division;

Mr. Jean Riou, accompanied by Mr. André Gaudreau, business agent, for ILA Local 1739;

Mr. Pierre Verreault, for ILA Local 1605;

Mr. Charles Paradis, for CUPE Local 3571;

Mr. Serge Morin, union advisor, for CUPE Local 3711.

Unrepresented Employers

Quebec Stevedoring Co. Ltd. (CODAR);

Reliance Marine Terminals Ltd.;

Compagnie d'Amarrage de Québec;

Ceres Corporation Inc.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

THE PROCEEDINGS

On September 13, 1994, the Board received from Bunge Canada Limited (Bunge or the employer) an application for review under section 18 of the Code seeking to amend the certification order granted on December 20, 1991 to the Canadian Union of Public Employees, Local 3571 (CUPE), to represent the following group of employees:

"all employees of Bunge du Canada Limitée engaged in the grain elevator operations at the Port of Quebec, classified as labourer, millwright, operator, assistant operator, electrician and supply clerk."

Bunge is asking the Board to include in this bargaining unit employees who are engaged in loading ocean-going vessels and are currently covered by the geographic certification order granted on November 25, 1981 to the International Longshoremen's Association, Local 1739 (ILA). This unit is described as follows:

"all the employees of all the employers engaged in loading and unloading vessels and in other related operations in the Port of Quebec area, excluding employees already covered by a certification certificate."

CUPE's bargaining unit covers all employees who carry out activities at the grain terminal operated by Bunge in the port of Quebec, including those employees engaged in unloading coastal vessels that transport wheat to the grain terminal. The latter function was excluded from the scope of the ILA's certification order in 1981, when the Board decided to consolidate in a single geographic bargaining unit all employees working for the employers engaged in longshoring in the port of Quebec, whether they were assigned to the loading or to the unloading of coastal or ocean-going vessels. The Board thus recognized that, in fact, there was no longer any justification for the distinction that had existed until then between coastal and ocean-going stevedoring operations. Its decision to exclude from the scope of the certification order the unloading of coastal grain vessels that had been carried out for several years by Bunge employees was explained as follows:

"As for the amendment concerning coastal stevedoring operations, we see no difficulty in allowing it. Our review of how the jurisdictions evolved clearly indicates that, since 1972, with the exception of Bunge's operations and those covered by other certificates - for example, those relating to stevedoring operations in the oil industry, which apply to both the coastal and ocean-going ships - stevedoring operation of coastal and ocean-going vessels have been carried out by members of Local 1739, who are bound by a collective agreement to the MEA. Moreover, it has been demonstrated that coastal and ocean-going ships are loaded and unloaded in the same way. The longshoring industry includes both

coastal and ocean-going vessels, and the distinction between the two is purely artificial, reflecting union jurisdictions of the day. In 1977, the Board did not have to rule on this aspect. As the MEA's application sought only to consolidate the various existing units and not to eliminate the distinction between 'coastal' and 'ocean-going' vessels, the Board merely adopted the traditional distinctions without discussing them although they no longer reflected reality, as we have seen. There is no reason for artificially maintaining a situation which has not corresponded to reality since 1972. The union is not seeking to include Bunge in its application. Owing to the acquired rights of the said company, the Board does not deem it appropriate to include it. Moreover, the Board is of the opinion that there is reason to maintain the status quo, and that it should not order the said company to accept the above-described unit. ..."

(Maritime Employers' Association (1981), 45 di 314 (CLRb no. 346), pages 337-338)

Thus, since 1981, all employers in the port of Quebec, with the exception of Bunge, which has been using its own employees to unload coastal grain vessels, and companies that handle dangerous substances such as acids or gasoline, have used longshoremen covered by the collective agreement entered into by the ILA and the Maritime Employers' Association (MEA) to do longshoring work in the port of Quebec.

The MEA became the agent of these employers and has been their employer representative since 1991.

Bunge's review application, if granted by the Board, would alter the existing bargaining structure in the longshoring industry in the port of Quebec. In fact, even though Bunge is not directly requesting that the geographic certification order be amended, its application seeks, incidentally, to remove from the scope of this order certain longshoring activities, i.e., loading grain aboard ocean-going vessels, which would in the future be included in CUPE's certification order.

Upon receipt of this application, the Board, following a preliminary examination of the conclusions sought, asked the parties initially affected, namely, the MEA, CUPE and the ILA, for their submissions in this regard. Based on this examination, the Board decided that all employers engaged in longshoring in the port of Quebec were to be identified as interested parties in these proceedings. Quebec Stevedoring Co. Ltd., Logistec Stevedoring Inc., Albert G. Baker Limited, Termino Corporation, Federal Marine Terminals, Reliance Marine Terminals Inc., Compagnie d'Amarrage de Québec and Ceres Corporation Inc. were therefore advised that a public hearing would be held to consider the effects of Bunge's review application on the geographic certification order that applies to the port of Quebec.

At the public hearing held on December 6 and 7, 1994, the employers identified as interested parties by the Board were represented by counsel, with the exception of Reliance Marine Terminals Ltd., Compagnie d'Amarrage de Québec and Ceres Corporation Inc. Counsel for Quebec Stevedoring Co. Ltd., Mr. Luc Huppé, informed the Board that its client had no intention of participating in the hearings in this case. At the hearing held on December 7, 1994, the Board informed the parties orally of its final decision to involve all the employers covered by the geographic certification order. The reasons for this decision were communicated to them by letter (Compagnie d'Arrimage de Québec Ltée, January 25, 1995 (LD 1392)).

The MEA raised an objection concerning Bunge's ability to file this application. It argued that under the terms of section 34(5) of the Code, only the appointed employer representative could file an application for review of a geographic certification order. The Board need not decide this question here because Bunge's application seeks to amend CUPE's certification order, not the geographic one. It therefore dismissed MEA's objection.

II

THE FACTS

The Board heard lengthy testimony, but the material facts of the case are as follows:

. Bunge is a grain selling and handling business that has been carrying out its activities in the port of Quebec since 1967.

. It operates a grain terminal in the port and unloads coastal grain vessels.

. It leases the grain terminal from the Société du Port de Québec under a contract that expires in 2017, as well as the site on which its facilities are located. It has exclusive use of the dock where ocean-going vessels are loaded.

. The grain handled by Bunge comes from the Prairies, the United States, Ontario and Quebec. This grain is transported to the terminal by train or coastal vessel. It is then unloaded and stored until it is shipped overseas by ocean-going vessels or to the domestic market by truck. The grain, if infested, is treated at the terminal. Since 1993, the terminal has had the capacity to winnow grain, and has done it in the case of the unprocessed grain it received.

. Approximately 10% of the grain handled in the port of Quebec belongs to Bunge.

. All coastal vessels are unloaded by Bunge employees. As a first step, approximately 60% of the grain is unloaded using bucket elevators operated from two marine towers by Bunge employees. The elevators are lowered into the hold from which the grain is removed, and placed on conveyors that carry it to the terminal where it is weighed and stored in silos. This step does not require the presence of Bunge employees aboard the ship. When the level of the grain in the hold is

sufficiently reduced, a shovel, operated by a Bunge employee from the bridge, moves the grain to the bucket elevator. Next, a front-end loader is lowered into the hold to continue moving the grain to the bucket elevator. Finally, when there is not enough grain for the bucket elevator, unloading is completed using vacuum pumps. The unloading of a conventional coastal vessel takes on average 18 hours, and requires the services of a dozen employees.

. During the loading of ocean-going grain vessels, the job of Bunge employees is to move the grain from the terminal to the vessel. This operation involves opening the silos and weighing the grain which is then carried by conveyors to the vessel. The loading of grain per se into the hold of the vessel is done jointly by the Bunge operator, located in a marine tower from where he controls the flow of the grain deposited in the hold, and by a longshoreman located on the bridge who, using a radio or hand signals, gives the operator appropriate instructions.

. No regular Bunge employees work aboard the vessel during the loading of an ocean-going vessel, as this longshoring activity is covered by the geographic certification. The longshoremen assigned to loading the grain ensure that the loading proceeds safely, having regard to the characteristics of the vessel. They are also called upon to perform other duties, such as spreading the grain, constructing partitions, and mooring and casting off ships.

. The team of longshoremen is composed of five persons: a grand foreman, a foreman and three longshoremen, including a replacement. The grand foreman acts as liaison with the person in charge of loading at Bunge, while the foreman supervises the work of the longshoremen and lends a hand in the loading activities.

. As of the date of the hearing, 10 longshoremen covered by the ILA's certification held the "grain" primary classification.

. Also as of that date, approximately 20 of Bunge's 37 regular employees carried out the general terminal operations such as the receipt, weighing, ensiling and treatment of grain and cleaning of the terminal and silos. These employees were also assigned to the unloading of coastal vessels. The other 17, who are specialized employees, were assigned mainly to the terminal's mechanical and electrical maintenance.

. Bunge employees have regular hours of work, and subject to their skills and the provisions of the collective agreement, carry out a variety of duties based on immediate operational requirements. Specialized employees may be assigned to general operations, but the reverse is not possible because these employees lack specialized training.

. Longshoremen work on call and are solely assigned to longshoring and related operations. The decision to call longshoremen to load an ocean-going vessel is made jointly by the shipping agent, who represents the owner of the cargo of wheat or the charterer of a vessel, and the longshoring company, in this instance Bunge, which acts in this capacity regarding grain loading operations, the whole in co-operation with government authorities such as Agriculture Canada and the harbour master. This decision is based on factors such as the ship's time of arrival, which the pilot can assess accurately, the tide, the weather and any other special condition, as the case may be. However, despite the precautions taken to ensure that the loading of the vessel will be completed within the specified time limits, this time target may not be met due to unforeseen circumstances.

. Longshoremen are called in within the time limits provided in the collective agreement, generally the day before the start of the shift. Except in certain cases covered in the collective agreement. They are paid for an eight-hour shift even if they do not have to work the full shift.

. Bunge pays its own employees, whereas Bunge's customers, i.e., those who use the dock where the vessel is loaded, pay the longshoremen assigned to the loading of ocean-going vessels. Bunge's customers also bear all unforeseen labour costs resulting from delays. In certain cases covered by the collective agreement, the MEA bears part of these costs.

. Bunge bills its customers for longshoring services at the rate specified in the ILA's collective agreement. Added to this rate is a percentage that constitutes payment for its services for acting as a longshoring company.

. Over the years, Bunge modernized its facilities, which enabled it to increase the volume of grain handled. Although loading procedures have not changed significantly since 1981, some loading and unloading operations have been automated.

. Bunge has further plans to modernize. Automation of grain flow control equipment within the terminal is under way. Bunge also plans to introduce a system for controlling the flow of grain into the hold of a vessel. This system is operated from the bridge of the ship rather than from the control towers where Bunge operators work. However, before investing in the implementation of this new technology, Bunge wants to know whether its regular employees or the longshoremen will perform this new function. If this function is covered by the geographic certification, Bunge would then be subject to the provisions of CUPE's collective agreement regarding lay-offs resulting from technological change.

. Some companies do longshoring work for third parties in the port of Quebec, using their own employees. One such company is IMTT which handles bulk liquids.

. Collective bargaining affecting the longshoremen is carried out, on the employer side, by the MEA, of which Bunge has been a member since 1981.

Bunge has been engaged in longshoring activities covered by the geographic certification since August 1987. Although possible much earlier, its decision to load ocean-going grain vessels was made after a lockout that affected the port of Quebec from September 1986 until February 1987. It thus used the monopoly provision of its contract with the port of Quebec, and became a subcontractor of Logistec Stevedoring Inc. which until then had loaded ocean-going grain vessels.

Bunge performs approximately 4 to 5% of all longshoring work in the port of Quebec, for which it uses from 1 and 2% of the longshoremen included in the geographic bargaining unit.

In the last three or four years, the sale and handling of grain have decreased significantly. The Canadian Wheat Board, for example, does not foresee any real recovery before the year 2000. This decline in activities has reduced significantly the number of regular employees in all job categories at Bunge. The number of regular employees represented by CUPE fell from 60 to 37 in a few years. This reduction was achieved partly through attrition, partly through lay-offs. As of the date of the hearings, 10 employees covered by CUPE's certification had been laid off: 2 electricians and 8 general labour.

III

POSITIONS OF THE PARTIES

1. Bunge's Position

This application relates to an effort by Bunge to rationalize its activities as a result of declining in sales and handling of grain in recent years.

The creation of an integrated work-force, consisting of all employees assigned to the carrying out of Bunge's activities, including the loading of ocean-going vessels, is a

major component of this rationalization. The existing bargaining structure is an impediment to employee mobility and the flexibility required to organize work effectively.

Regular employees already perform coastal longshoring work and share common interests with longshoremen engaged in ocean-going longshoring involving grain, for there is no difference between these two types of longshoring. Moreover, there is no need to assign permanently five longshoremen to load grain aboard a vessel when 90% of the loading per se is done by gravity. Bunge explained that it could assign this work to its regular employees on a as needed basis. This approach would reduce costs because, at present, it cannot call longshoremen without paying them even if there is no work for them.

The current bargaining structure thus entails needless, high labour costs, including the costs of job security and others benefits payable to longshoremen. These benefits argues Bunge, are considerable. It pointed out that, unlike the other employers in the port, it cannot dispatch this manpower to other work sites as it operates in one location only.

Moreover, the current labour relations system in the port of Quebec not only adversely affects labour relations in the port, but its ability to compete as well. Competitors in other St. Lawrence ports use their own employees to load ocean-going vessels because they are not covered by a geographic certification order.

In support of its application, Bunge stated that it was prepared to offer 10 longshoremen who hold the "grain" primary classification, a regular employee position. This, it argued, will guarantee it the availability of competent employees, while providing them with regular and stable employment. Bunge believes that these new employees can be integrated without any lay-offs because more flexible work assignments will result in more effective personnel management. For example, Bunge

could negotiate on its own a collective agreement that would reflect its particular needs, which industry-wide bargaining has not always managed to do.

(2) The Position of the Respondents and the Mis-en-cause

The MEA, the employers present at the hearing and the unions challenged the application.

1. For MEA, this application fragments the existing geographic bargaining unit in the port of Quebec.

The history of collective labour relations in the port of Quebec shows that, before and even after the issuing in 1977 of the first geographic certification order that applied only to ocean-going longshoring, the employees represented by the ILA engaged in ocean-going and coastal longshoring, excluding the unloading of coastal grain vessels. From 1981 on, these two types of longshoring have been covered by a single geographic certification order. In fact, the situation has not changed, and until now, Bunge never sought to exclude from the scope of the 1977 and 1981 certification orders the loading of ocean-going grain vessels.

Bunge did not present any new facts that would require a change in the collective labour relations organization in the port of Quebec. It provided no evidence of any change in operating procedures, or in the conditions under which longshoring work has been performed since 1981, that might affect the methods of organizing collective labour relations. The only new fact that has come to light since this date was Bunge's decision, in 1987, to engage in new activities, i.e., the loading of ocean-going vessels covered by the geographic certification and the collective agreement. By making this decision, Bunge became subject to the geographic certification and the collective agreement entered into by the MEA and the ILA, like all other employers engaged in ocean-going longshoring activities in the port of Quebec.

Bunge did not demonstrate that industrial peace in the port of Quebec would be better served by such a bargaining structure. To grant Bunge's application would alter the geographic certification order in the port of Quebec, when the evidence does not support such a finding.

Logistec, Albert G. Baker Limited and Termino Corporation concurred with the MEA's position.

2. All the unions oppose Bunge's application.

In CUPE's opinion, the grounds alleged by Bunge and the evidence presented did not establish that a change in the bargaining structure would guarantee more harmonious labour relations. Moreover, Bunge did not establish that it must bear labour costs in addition to, or different from, those borne by other longshoring companies. Its situation was therefore no different from that of other employers in the port.

Moreover, should Bunge decide to hire longshoremen as regular employees, implementing that decision would cause major problems. In fact, longshoremen generally have more seniority than Bunge employees, and the ILA's collective agreement provides a very complete job security plan. The arrival of these new employees could therefore be expected to bring about lay-offs among existing regular Bunge employees, not to mention the fact that a number of these employees had already been laid off for lack of work. Furthermore, unions had not been consulted prior to this request concerning the possibility of Bunge's offering employment to the potentially affected longshoremen, and no method of integrating them had therefore been discussed with the employer.

The ILA shared CUPE's views regarding the integration problems that hiring longshoremen would cause. The need to match the working conditions of the two

groups of employees having regard to the provisions of the collective agreements would be a formidable challenge.

IV

Over the years, the Board has developed criteria governing applications for review that seek to alter an employer's bargaining structure. It summarized these criteria as follows in Canadian Broadcasting Corporation (1993), 92 di 95 (CLRB no. 1023):

"However, anxious to protect the definitive character of its decisions and the stability of labour relations, the Board set out certain guidelines for the exercise of its review power. ...

...

What is clear from these decisions, apart from the fact recognized by all that each is an individual case, is that it must be established that the units are not or are no longer appropriate, that they are complex or obsolete, depending on the vocabulary used in the particular decision. In other words, the applications have to be based on reasons associated with the organization of sound labour relations.

Therefore, the Board will not welcome from an employer, any more than it would from a union, applications based on short-term opportunism that is designed, for example, to short-circuit the bargaining process. On each occasion, the Board must carefully weigh the reasons supporting the application in terms of the principles cited earlier, i.e. the definitive character of its decisions and the stability of labour relations. ..."

(page 104-105)

In the present case, these criteria take on a special dimension. Even though, in its application, Bunge is not seeking to amend the geographic certification order in the port of Quebec, the immediate consequence of this application, if granted by the Board, would be to divide the 1981 geographic certification unit.

As the Board has stated repeatedly, the establishment of such a bargaining unit is designed to meet the specific needs of the longshoring industry. (See Maritime Employers' Association, *supra*; Maritime Employers' Association and Terminaux Portuaires du Québec (1987), 65 di 162; and 19 CLRBR (NS) 34 (CLRB no. 642); and Quebec Ports Terminals Inc. et al. (1992), 89 di 194; and 93 CLLC 16,036 (CLRB no. 968).) For this reason, the grounds alleged must satisfy the Board that this geographic certification is no longer viable, or no longer meets the objective set, i.e., the establishment of harmonious labour relations based on the use by several employers of a single, stable, qualified labour pool.

In defining or reviewing bargaining units, the Board must strike a balance between divergent interests. This is always a difficult task, and especially so in the longshoring industry where the sometimes rapidly changing nature of employer interests is an important factor. The number, identity and relative economic importance of the employers who work from time to time in the port of Quebec vary. Bunge now carries out ocean-going longshoring work, which it did not do prior to 1987, but may very well soon decide to stop doing so, like any other employer in any other location. It is in light of this particular reality that the Board must examine the instant application.

For the application to succeed, Bunge must therefore satisfy the Board that new facts or important changes warrant amending CUPE's certification order, since Bunge's application also affects the scope of the geographic certification order. It must also satisfy the Board that the proposed changes will not jeopardize the orderly conduct of collective labour relations at both Bunge and in the port of Quebec.

V

In order to decide this case, the Board must determine whether Bunge, which has carried out two separate but related commercial activities since 1987, is now justified to ask that the two activities be covered by a single certification certificate, i.e. in this

case CUPE's certificate. In other words, has Bunge established that the geographic certification that governs one of these activities, namely, the loading of grain aboard ocean-going vessels, so negatively affects the effective management of its two commercial activities as to require amending the certification?

An examination of the evidence and the arguments has not satisfied the Board that this application for review has merit.

Bunge did not establish any new facts or special circumstances that would warrant the Board's intervening and revising the scheme governing the collective representation of Bunge employees and the longshoremen in the port of Quebec. The only new fact brought to the Board's attention is Bunge's 1987 decision to engage in ocean-going longshoring. When Bunge made this choice, it knew, or ought to have known of the labour relations consequences such a decision would have. In the instant case, the Board decision in Equipements Bellemare Ltée (1995), as yet unreported CLRB decision no. 1112, applies. Bunge's decision in itself does not constitute a new fact that would warrant a review of the bargaining structure. Nor, do, for that matter, the major fluctuations in foreign grain sales from the standpoint of longshoring. The fluctuations in the nature and distribution of longshoring activities are precisely what contribute to the need for, and the establishment of a multi-employer bargaining unit. One of the objectives of such a form of certification is specifically to allocate more equitably among all employers the costs of maintaining a regular labour pool.

The other grounds alleged by Bunge in support of its application were also examined and led the Board to the following conclusions:

. Bunge does not assume additional labour costs when the services of longshoremen to load ocean-going vessels are used; these costs are borne by its customers, or in some instances by MEA.

. The lead time provided for calling longshoremen to work, a factor in some of these costs, and the fact that Bunge, unlike other employers, cannot dispatch longshoremen to other work sites, do not justify Bunge's application. Nothing in the evidence establishes that these lead time situations are so frequent or costly as to demand a review of the system. As to the argument that the other employers engaged in longshoring can dispatch longshoremen to other locations, there is no evidence to suggest that this is a significant factor.

. With regard to Bunge's competitive situation vis-à-vis that of its competitors in Port-Cartier or Sept-Îles, the file does not show that the conditions offered by these competitors put it at a disadvantage, or that Bunge cannot offer its customers conditions that are comparable to, or better than those offered by these companies.

. Bunge's argument that its viability, currently affected by the general decline in the grain trade, would improve if the loading of ocean-going vessels were carried out by its own employees as members of a single bargaining unit, is not supported by the evidence.

In any case, this objective could not be achieved unless Bunge negotiated with the unions concerned the integration of the two groups of employees along with the development of mutually satisfying terms and conditions of employment. Bunge did not take this initiative prior to filing its application. The concerns expressed by the unions regarding the problems that a possible integration of these new regular employees at Bunge would pose in the context of a general decline in the volume of work appear genuine. The Board does not question Bunge's good faith in this regard, but does the timeliness of this approach and its chances of success, at this stage, having regard to the evidence presented to the Board.

Bunge's dissatisfaction with the progress and outcome of collective bargaining with the ILA and is not sufficient to justify a review of the bargaining system. While it is

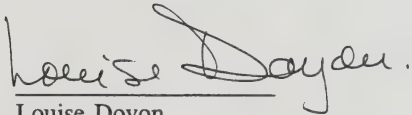
true that Bunge did not get support for all its demands, the same holds true of the other employers and the union. This is the give-and-take of collective bargaining, particularly in the context of a multi-employer certification.

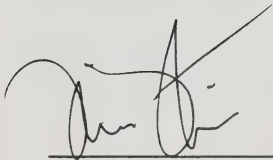
The division of Bunge's work-force between two bargaining units is not here grounds for a review by the Board of the bargaining structure in the longshoring industry in the port of Quebec. Such a review would instantly confer on Bunge individual employer jurisdiction over the longshoremen assigned to loading grain aboard ocean-going vessels.

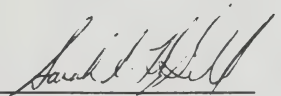
The multi-employer labour relations system in place is specifically designed to ensure the integrated management of the single labour pool shared by several employers in the port of Quebec. In this regard, the Board is not convinced that the advantages Bunge believes it could derive from an exception to the rule of geographic certification would not in the end, create more disadvantages, for both longshoring activities in the port of Quebec, and the continuance of orderly labour relations at Bunge. From this perspective, the other employers' opposition to this application is a factor in the Board's decision.

The advantages and disadvantages of a multi-employer certification system must be assessed with reference to the needs of the various stakeholders. In this case, the evidence does not reveal that the certification orders in question are no longer viable, or no longer meet the needs for which they were issued. More particularly, the Board heard nothing that would justify it to conclude that the existing certification model does not allow or no longer allows an effective work organization.

For all these reasons, the Board dismisses the application for review.


Louise Doyon
Vice-Chair


François Bastien
Member


Sarah E. FitzGerald
Member

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Summary

Atomic Energy of Canada Limited, *applicant*, and International Association of Machinists and Aerospace Workers, United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada Local 254, United Steelworkers of America, and Pinawa Fire Fighters Association A.E.C.L., Local F-160 of the International Association of Fire Fighters, *respondents*.

Board File: 530-2293
CLRB/CCRT Decision no. 1135
August 11, 1995

The employer, a federal Crown corporation, brought an application for review and consolidation of bargaining units at its Pinawa, Manitoba location. Four bargaining agents represented six units at the workplace. There were four collective agreements. The employer preferred a consolidation of the six bargaining units into one.

The employer had to show that there was some justification for the change sought in existing bargaining unit structures, as such a consolidation is an extraordinary measure. The Board takes a case-by-case approach in these reviews, and examines all factors to ascertain the unit or units that are the best for all parties, that allow the employees to have access to collective bargaining, and that make the bargaining process and the application of the collective agreement more effective.

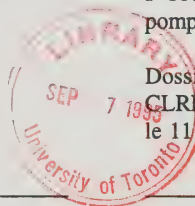
Résumé

Énergie atomique du Canada Limitée, *requérante*, ainsi que l'Association internationale des machinistes et des travailleurs de l'aérospatiale, Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie des États-Unis et du Canada section locale 254, Métallurgistes unis d'Amérique et Pinawa Fire Fighters Association A.E.C.L., section locale F-160 de l'Association internationale des pompier, *intimés*.

Dossier du Conseil: 530-2293
CLRB/CCRT Décision n° 1135
le 11 août 1995

L'employeur, une société de la Couronne fédérale, a présenté une demande de révision en vue de faire fusionner les unités de négociation à son établissement de Pinawa, au Manitoba. Quatre agents négociateurs représentent six unités, et quatre conventions collectives sont en vigueur. L'employeur aimerait bien que les six unités soient fusionnées en une seule.

L'employeur doit démontrer que la modification demandée à la structure de négociation existante est justifiée, puisqu'une telle fusion constitue une mesure extraordinaire. Le Conseil étudie ce genre de demandes cas par cas et il examine tous les facteurs pour s'assurer qu'il s'agit de l'unité qui convient ou des unités qui conviennent le mieux aux parties, que les employés ont accès à la négociation collective et que le processus de négociation et la convention collective sont rendus plus efficaces.



In this case, the evidence did not indicate a need to interfere with the established bargaining structure. The employer had not shown that such a change was necessary. While a consolidation of bargaining units may have been more convenient for the employer, such convenience was not evidence enough to allow the Board to prefer change to the status quo. The application was dismissed.

En l'espèce, la preuve ne fait pas ressortir la nécessité de s'immiscer dans la structure de négociation établie. L'employeur n'a pas démontré qu'un tel changement était nécessaire. Bien qu'une seule unité fusionnée conviendrait peut-être davantage à l'employeur, cela ne constitue pas un élément de preuve qui permettrait au Conseil de préférer le changement au statu quo. La demande est rejetée.

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LES MOTIFS DE DECISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Atomic Energy of Canada Limited,

applicant,

and

International Association of Machinists and
Aerospace Workers, United Association of
Journeyman & Apprentices of the Plumbing &
Pipe Fitting Industry of the United States and
Canada Local 254, United Steelworkers of
America, and Pinawa Fire Fighters Association
A.E.C.L., Local F-160 of the International
Association of Fire Fighters,

respondents.

Board File: 530-2293
CLRB/CCRT Decision no. 1135
August 11, 1995

The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Messrs. Calvin B. Davis and Michael Eayrs, Members. A hearing was held on April 19 and 20 and June 15 and 16, 1995, in Winnipeg.

Appearances

Mr. Steven Bird, for the applicant;

Mr. Richard K. Deeley, for the respondent, International Association of Machinists and Aerospace Workers;

Mr. Robert Healey, for the respondent, United Steelworkers of America;

Mr. Ian F. Blomeley, for the respondents, United Association of Journeyman & Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada Local 254, and Pinawa Fire Fighters Association A.E.C.L., Local F-160 of the International Association of Fire Fighters.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

I

This is an application brought by the employer pursuant to section 18 of the Canada Labour Code for a review and consolidation of the bargaining units of employees at its Whiteshell research laboratories located at Pinawa, Manitoba.

As is set out in the officer's report in this matter, the applicant AECL Limited is a federal Crown corporation established pursuant to the Atomic Energy Control Act and is responsible for conducting a wide range of research into various areas of nuclear technology. It consists of two operating companies, AECL Research and AECL CANDU. AECL Research has facilities located in Pinawa (Whiteshell Laboratories), Chalk River (Chalk River Laboratories) and Ottawa (Headquarters). AECL CANDU has facilities located in Mississauga, Montréal and Toronto.

The present application affects only AECL Research's Whiteshell Laboratories, at Pinawa. A similar application has been filed by the employer in respect of operations at Chalk River, but the circumstances of the two cases are quite different, and the present decision relates only to the Pinawa operations and the bargaining unit structure in effect there. No conclusions should be drawn from the disposition of this case in respect of its potential application elsewhere.

II

The Whiteshell Laboratories were established in 1963 and are located approximately 120 kilometres east of Winnipeg in the Local Government District of Pinawa. In addition to the main research laboratories, AECL Research operates a facility known as the Underground Research Laboratory, which is located approximately five kilometres from the Whiteshell Laboratories. The Underground Research Laboratory is a facility which is conducting research into the storage of nuclear fuel waste in hard rock.

At the Whiteshell Laboratories, there were, at the time of the officer's report, approximately 790 full-time employees, 100 part-time employees and 50 third-party "contractor" employees. Over the years since 1965, the Board has certified a number of trade unions as bargaining agents for a number of bargaining units, and these units have been varied from time to time. At the time of the officer's report in this matter, seven bargaining units, each represented by one or another of five bargaining agents, being the four respondent trade unions, and the Pinawa Nurses Local 46, Manitoba Nurses' Union. Three of the bargaining units are represented by the IAM as bargaining agent. At present, however, there are no nurses employed by AECL Research at Pinawa, responsibility for the Pinawa Hospital (formerly the responsibility of AECL), having been transferred to the Winnipeg River Health District. Employees of the Pinawa Hospital are now considered to be employees of the Winnipeg River Health District, which has recently been declared by the Manitoba Labour Relations Board to be a successor employer to the Pinawa Hospital. It would seem clear that the nurses are now under provincial jurisdiction, and the Pinawa Nurses Local 46, Manitoba Nurses' Union, advised that it would take no part in these proceedings.

At the time of the officer's report, there were four collective agreements in effect in respect of employees of AECL Research at Pinawa, one with each of the respondent trade unions in respect of the bargaining unit or units represented by that union (the collective agreement with the IAM was in respect of the three bargaining units which it represents). Each of these collective agreements bore an expiry date of March 31, 1995.

Of the four respondent trade unions, the International Association of Fire Fighters represents a bargaining unit of some 22 employees, classified as Firefighter (10), Firefighter Trainee (6) and Firefighter Lieutenant (6). The International Association of Machinists represents, in its three bargaining units, some 89 employees, mostly in trades and related classifications. The United Association of Plumbers and Pipefitters represents a unit consisting of 11 Mechanical Maintainers, being either steamfitters

or welders. The United Steelworkers of America represents a unit of 17 employees, classified as Decontamination Workers (11) or Utility Workers (6), and working at various locations. The total number of unionized employees is thus 139.

The applicant seeks the consolidation of the above bargaining units into one unit. The respondents United Steelworkers of America, United Association of Journeymen & Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and International Association of Fire Fighters opposed the application. In its initial response, the respondent International Association of Machinists advised that it did not oppose the application, but at the hearing of this matter, in argument, the respondent International Association of Machinists took the position that the evidence presented did not support the application, and joined the other trade unions in opposing it.

The Board's approach to applications of this type is of a case-by-case nature, the general principles underlying that approach being set out in a number of cases including some quite recent ones. The Board has recognized that jobs, industries and organizations change and that, in some circumstances at least, collective bargaining relationships need to be changed as a result of such evolution. Thus, in Canada Post Corporation (1988), 73 di 66; and 19 CLRB (NS) 129 (CLRB no. 675), relied on by the employer, the Board said:

"In the instant case, we are cognizant of the fact that it is not our obligation to establish the most appropriate bargaining units. The statute talks only of appropriate bargaining units. Nonetheless it was our intention at the commencement of these proceedings, and it has remained our intention throughout, to establish bargaining units that most closely meet the needs of the employees and the employer today and in the future. The direction the Board has taken in the instant case has been to try to establish bargaining units that allow the employer to conduct its operations in as reasonable and logical a manner as possible while, at the same time, protecting the rights of employees as provided under the Canada Labour Code. We have, on

the one hand, taken extreme care to ensure that the issue that we focused on is not what is best for the bargaining agents as they (while not diminishing the importance of their role) only represent the outward manifestations of the needs and desires of their members.

What we established as our principal objective is to ensure that the configuration of bargaining units that we determine allows and provides for employees the greatest benefit while employed with the Corporation, to alleviate to the extent possible their considerable fears with regard to job security, and to permit the greatest amount of flexibility to employees in furthering their careers within the organization without being artificially restricted. This panel adheres to the philosophy that favours the formation of large bargaining units and looks with disfavour on the notion of the artificial fragmentation of bargaining units. ..."

(pages 91; and 154)

More recently, in Quebec North Shore & Labrador Railway Co. (1992), 90 di 110; and 93 CLLC 16,020 (CLRB no. 978), the Board stated the tests for determination of an appropriate unit as follows:

"The tests for determining whether a unit is appropriate for collective bargaining take into account the interests of both the employees and their employer. Without claiming to make an exhaustive list of these factors, we would note, inter alia, the community of interest among the employees, the method of organization and administration of the business, the history of collective bargaining with the employer and in the industry in question, whether the employees are interchangeable and the interests of industrial peace. The tests may have different weight, depending on the individual case, particularly in terms of whether it is an application for certification or an application for review. In the first situation, the Board must allow the employees to have access to collective bargaining. In the second, it must examine the existing bargaining structure in order to make the bargaining process and the application of the collective agreements more effective. However, it must always try to balance what are often divergent interests in determining viable bargaining units and in

order to ensure effective bargaining and the most harmonious labour relations possible.

As much as possible in both cases, taking into account the tests referred to above, of course, the Board will prefer large units rather than multiple small units. ..."

(pages 123-124; and 14,147-14,148)

This Board, like other labour relations boards, has consistently required that some substantial justification for a change in existing bargaining unit structures be established, where change in those structures is sought. The Labour Relations Board of British Columbia stated this rather forcefully in MacMillan Bloedel Ltd. (1984), 8 CLRBR (NS) 42, as follows in the headnote of the decision:

"The Board enunciated the legal framework which it accepted as applying to applications for consolidation under the Labour Code. First, the Board will not lightly interfere with established bargaining structures, particularly in cases where to do so would result in the loss of bargaining rights for one of the trade unions involved. Rather, consolidation of existing bargaining rights is an extraordinary measure which the Board will resort to only in situations where there is a serious labour relations problem for which consolidation is the result most able to further the principles and policies of the Code. Second, the Board will not consider consolidation applications in the same way in which it considers fresh applications for certification. Third, the kind of jeopardy which an employer or other applicant relies on in support of such an application must be of a profoundly serious nature. Where real and demonstrable adverse labour relations consequences are evident, the Board will also be required to consider the possibility that such consequences will recur in the future. Mere administrative inconvenience and inefficiency, of itself, normally will not suffice. The Board must be satisfied that effective industrial relations have been virtually frustrated by the impugned bargaining structure. The Board has in the past and will continue to exercise its discretion on consolidation applications in such a way as to confine its

intervention in longstanding historical bargaining relationships to situations where extraordinary relief is required."

(pages 44-45)

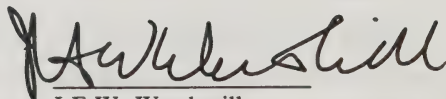
While the foregoing may be thought to be somewhat too strictly put, there is no doubt that there is an onus on the applicant in an application such as this to establish good grounds for the Board's interference with established bargaining structures, and the applicant in the present case accepted that onus. It may well be that if this were an original application for certification, the Board would determine that a single "industrial" bargaining unit of the sort suggested by the employer was appropriate, although it might also be that the firefighters, who also carry out significant security duties, would in any case be included in a distinct bargaining unit.

In the instant case, the Board, having heard all of the applicant's evidence, does not consider that the circumstances are such as to call upon the Board to interfere with the established bargaining unit structure. Indeed, the evidence established that that structure works well, and although the existence of certain distinctions between classifications of employees based on craft lines and reflected in bargaining unit membership may have inhibited the employer in its willingness to make certain work assignments, the evidence is that the employer has never sought in any significant way to go forward with such assignments, nor sought, at least not in any persistent way, the co-operation of the trade unions involved (with whom a good relationship exists, and who have displayed a considerable degree of co-operation in collective bargaining) in order to achieve the flexibility in assignment which it might quite reasonably require.

The employer's case, to put the matter bluntly, has not been made out on the evidence before us. Certainly, the employer's organization has changed over the years, and there has been a significant downsizing, particularly at the supervisory level. The employer has taken a non-confrontational stance with respect to many matters which

it regarded as problems. Partly on this account perhaps, and no doubt for many other reasons to the credit of all parties, the working relationship has improved in recent years. The number of grievances filed has decreased; the rate of absenteeism has decreased; productivity has increased. While the company might find it somewhat more convenient to deal with one bargaining agent rather than four in the administration of collective agreements, that consideration does not outweigh, in the circumstances of this particular case, the value of maintaining the traditions of employee representation by the bargaining agents in question here. This is not to say that the institutional interests of the trade unions carry great weight in cases such as this; the Board is, properly, much more concerned with the interests of employees as such, and in the instant case there has not been, as there was in some of the major restructuring cases which have been referred to, any expression of employee dissatisfaction with the present structure, nor has the employer established that employee interests would be better served, to any significant degree, by a changed structure.

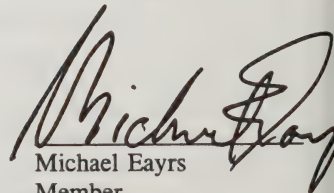
For all of the foregoing reasons, the application is dismissed.



J.F.W. Weatherill
Chairman



Calvin B. Davis
Member



Michael Eayrs
Member

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Summary

Teamsters, Local Union No. 31 and Brad Hildebrant, *complainants*, and Atomic Transportation System Inc., *respondent*.

Board File: 745-4719
CLRB/CCRT Decision no. 1136
August 15, 1995

In this complaint, the union and an employee allege that the employer, contrary to the Code, disciplined and discharged the employee for his role as a union organizer.

The Board found, based on all the evidence, that the employer's treatment of the employee, following his admission that he was the union organizer, changed substantially when compared with its former treatment of him, its normal disciplinary procedures and its treatment of other employees. As a result, the Board found that while some of its disciplinary actions may have been justifiable in normal circumstances, the employer's actions with respect to the complainant were, at least partially, motivated by his activities on behalf of the union and thus contrary to the Code.

The Board ordered the employer to cease its contravention of the Code and reinstate the complainant, with compensation, to his former employment position.

Résumé

Section locale 31 du syndicat des Teamsters et Brad Hildebrant, *plaignants*, et Atomic Transportation System Inc., *intimée*.

Dossier du Conseil: 745-4719
CLRB/CCRT Décision n° 1136
le 15 août 1995

Dans la présente plainte, un employé et son syndicat allèguent que l'employeur a imposé, contrairement aux dispositions du Code, une mesure disciplinaire à l'employé en question et l'a congédié parce que celui-ci était organisateur syndical.

D'après l'ensemble de la preuve, le Conseil juge que la façon dont l'employeur a traité l'employé, une fois que ce dernier a admis être un organisateur syndical, différerait considérablement de la façon dont l'employeur le traitait auparavant, du processus disciplinaire habituel et de la façon dont il traitait les autres employés. Par conséquent, le Conseil juge que même si certaines mesures disciplinaires auraient été justifiées dans des circonstances normales, les mesures prises par l'employeur à l'égard de l'employé étaient fondées, du moins en partie, sur les activités syndicales de l'employé, contrairement aux dispositions du Code.

Le Conseil ordonne à l'employeur de cesser de violer le Code, de réintégrer l'employé dans ses fonctions et de le dédommager.



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LES MOTIFS DE DECISION DU CCRT SONT
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Reasons for decision

Teamsters Local Union No. 31 and Brad
Hildebrant,

complainants,

and

Atomic Transportation Systems Inc.,

respondent.

Board File: 745-4719
CLRB/CCRT Decision no. 1136
August 15, 1995.

The Board was composed of Mr. Jean L. Guilbeault, Q.C./ c.r., Vice-Chair, and Messrs. Michael Eayrs and Patrick H. Shafer, Members. A hearing was held in Vancouver on July 5, 6, 7, 27 and 28, 1994, followed by written submissions from the parties.

Appearances

Mr. Don Davies, Counsel, assisted by Mr. Brent Hales, for the complainant;
Mr. Barry Y.F. Dong, Counsel, assisted by Mr. Dennis Engel, Vice-President and General Manager, and Mr. Jon Samson, Manager, Pacific Region, for the respondent.

These reasons for decision were written by Mr. Michael Eayrs, Member.

The complainants allege violation of section 94(3)(a)(i) of the Canada Labour Code (Part I - Industrial Relations), which reads as follows.

*"94. (3) No employer or person acting on behalf of an employer
shall*

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union, ..."

Many of the facts in this case are not in dispute. Brad Hildebrant worked as a dock worker for Atomic Transportation Systems Inc. from June 2, 1986 to November 30, 1993. He had worked at the employer's Vancouver location since January 1990. His tasks included the operation of a truck lift or fork lift for loading and unloading trailers. His employment was terminated on November 30, 1993 in accordance with the employer's theory of progressive discipline. The employment record of Mr. Hildebrant cannot be described as blemish-free, as is seen below.

The dispute between the parties in this case arises in respect of the part that Mr. Hildebrant's self-admitted union organizing activities played in his dismissal. The employer states, and submits that the evidence shows, that the employer had reasonable cause to terminate Mr. Hildebrant. The employer further argues that Mr. Hildebrant used his union organizer status as a "sword not a shield" to "provoke" and "get even with" the employer. The union argues that while Mr. Hildebrant's behaviour was not exemplary, he was a union organizer, and anti-union animus played at least a secondary role in his dismissal. The union admits that Mr. Hildebrant "made some mistakes" in his work, and that he had engaged in some "unquestionably inappropriate behaviour" in making certain strange telephone calls. However, the union argues that the discipline the employee received was harsher once the employer knew he was a union organizer, that the disciplinary measures imposed were out of character for the employer and that the employer had set out to "build a book" on Mr. Hildebrant by micro-managing and closely watching him.

THE LEGAL TESTS INVOLVED

There was, of course, much evidence presented about what Brad Hildebrant did or did not do. We must put into focus, however, the elements this Board's inquiry must address.

In cases of alleged violation of section 94(3), section 98(4) of the Code reverses the burden of proof:

"98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

Consequently, the Board most frequently will rely on circumstantial evidence to decide if there exists anti-union animus:

"The Board has, on several occasions, held that an employer could dismiss an employee and that such a dismissal would not necessarily contravene the Canada Labour Code, section 184(3)(a) in particular, if the employer was not motivated by anti-union animus. When considering the employer's animus, we must examine its overall behaviour and conclude on the basis of circumstantial elements, since it is well-known that no employer will acknowledge that it was motivated by anti-union animus. ..."

(Purolator Courier Limited (1982), 48 di 32 (CLRB no. 365), page 54; see also Emery Worldwide (1990), 79 di 150 (CLRB no. 775))

It is most important to remember, however, that it is not the Board's task to determine the propriety of the dismissal in terms of "just cause," or to stand in the place of a rights arbitrator in respect of a dismissal:

"It is only natural for an employer to submit evidence of cause or just cause when faced with a complaint of unfair practices surrounding the dismissal of an employee, or failure to recall an employee which amounts to a failure to continue to employ that employee. The Board will hear this evidence not to rule on it but, we repeat, to make sure, in the exercise of its mandate, that this cause alleged by the employer is not associated with anti-union discrimination.

In other words, the Board is fully aware, and has stated this several times, that it does not have jurisdiction to determine rights disputes (within the meaning of labour relations) which can arise between parties when an employee has been dismissed whether there was just cause, cause or even no cause."

(Verreault Navigation Inc. (1978), 24 di 227 (CLRB no. 134), page 288)

This means that the onus on the employer is not necessarily to demonstrate that it had just cause to dismiss Mr. Hildebrant, but that in taking the actions it took, whether they were right or wrong from a dismissal standpoint, such actions were not taken with any anti-union animus.

On this latter point, the cases are clear that **any** anti-union animus is enough to taint the actions of the employer. The applicable test is described extensively in National Pagette (1991), 85 di 1 (CLRB no. 862):

*"When the Board examines the merits of an unfair labour practice complaint, particularly one involving dismissal, its role is very different from that of an arbitrator. The reasons for the decision to dismiss an employee are relevant only insofar as they reveal, through their nature, their occurrence in time, their severity or their impact, that the decision was motivated by anti-union animus. **In discharging the reverse onus of proof imposed in section 98(4) of the Code, the employer must show that its reasons for dismissing an employee are in no way motivated by anti-union animus.** Past Board decisions dealing with this subject are as abundant as they are unequivocal. It is appropriate to quote in extenso the following excerpt from *Air Atlantic Limited* (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600):*

'The law on the subject of discrimination against employees for having exercised rights under the Code is well settled. If a decision by an employer to take any of the actions described in section 184(3)(a) against an employee has been influenced in any way by the fact that the employee has or is about to exercise rights under the Code, then the employer's actions will be found to be contrary to the Code. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the Code:

"... It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1). To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.

For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is contemplated by section 184(3), he will be found to have committed an unfair labour practice."

(Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82), pages 284-285; and 461; emphasis added)'

(pages 34-35; and 14,007; emphasis added)

In addition to this decision, see also Larose-Paquette Autobus Inc. (1990), 83 di 175 (CLRB no. 840), for other relevant references.

The framework for examining evidence presented by either party is therefore clear. The central question to be answered here is whether, based on the documentary and oral evidence, the reasons stated by the employer in its dismissal memo to Louise Arbour are absolutely the only reasons that entered into its decision, notwithstanding the question of whether they are, otherwise, legitimate and valid."

(pages 9-10; emphasis added)

See also Transport Papineau Inc. (1990), 83 di 185 (CLRB no. 842), where the Board discussed the concept of pretext versus real cause:

"When examining the merits of a complaint of unfair labour practice, the Board must be satisfied that the employer has not taken actions to limit or impede the legitimate exercise by employees of the rights conferred by the Code. The employer's actions must not be motivated by anti-union animus, but must be for cause. This does not mean, however, that it is up to the Board to determine whether the reasons given by the employer to justify the action are valid, fair and commensurate with the seriousness of the alleged offence. The Board has no authority to determine whether the penalty imposed is commensurate with the alleged offence (see Services Ménagers Roy Ltée (1981), 43 di 212 (CLRB no. 308); and Pierre Fiset (1985), 55 di 233; and 85 CLLC 14,041 (CLRB no. 473)).

The Board, however, can examine the nature of the cause alleged by the employer, not to assess its fairness or determine its validity having regard to the context in which it is alleged, but to determine whether it has the appearance of a pretext. This approach enables the Board to satisfy itself that this is indeed the real reason for the penalty and not an excuse or a pretext that masks anti-union animus. ..."

(page 190; emphasis added)

In Jacques Lecavalier (1983), 54 di 100 (CLRB no. 443), the Board, in explaining the test, seemed to recognize that an employer motivated by anti-union animus may be justified in dismissing an employee for other reasons:

"The Board, as is well known, has consistently held, in interpreting the provisions of sections 184(3)(a)(i) to (vi) of the Code, that anti-union animus or motivation must be an essential element of any violation of these provisions. The Board must therefore determine whether, in dismissing the complainant, the employer was either motivated by anti-union animus or whether this motivation was also present if it were established that the employer claimed to have or in fact had just cause to dismiss the employee."

(page 118; emphasis added)

However, it must be shown that those reasons do not include any anti-union animus:

"... Foremost, the employer must establish that, whether or not there was just cause, its action was not tainted by anti-union animus. The union must establish that there was anti-union animus, again whether or not there was just cause."

(Pierre Fiset (1985), 55 di 233; and 85 CLLC 16,041 (CLRB no. 473), pages 242; and 14,268; emphasis added)

"It is the policy of this Board in interpreting and applying section 184(3)(a) of the Code - as it is with most other boards across Canada - that the existence of an anti-union animus in the mixture of motives underlying the dismissal or termination makes such dismissal or termination contrary to the Code. ..."

(A & M Transport Limited (1983), 52 di 69 (CLRB no. 422), page 86, affirmed by the Federal Court of Appeal in A & M Transport Limited v. Bernard Black et al., judgment rendered from the bench, no. A-1129-83, October 25, 1993)

The employer may be found to have anti-union animus directed either at the employees in general or at a particular employee:

"... In order for there to have been a violation of section 184(3)(a), one of the reasons for the dismissal must have been the union activities of the employees in general or the complainant in particular. This reason need not be the only one; it may be one of several reasons. ..."

(Purolator Courier Limited, *supra*, page 54)

There are, of course, cases where the employer discharged the heavy onus placed on it. In Provincial Bank of Canada, Jonquière (1979), 36 di 58 (CLRB no. 216), the Board decided that the complainant was dismissed for incompetence and not for union activities although the Board would have concluded that the employer's actions aimed at influencing the employees' wishes violated the Code:

"In these circumstances, we must ask ourselves whether Miss Duval's dismissal was related to her union activities. To begin with, the Board would probably have found the employer's actions in attempting to influence the wishes of its employees during May-June 1978 contrary to the provisions of section 184 of the Canada Labour Code. These actions, however, must be viewed in the context of the employees' wishes to join a union. In the case before us, we are faced with a complaint alleging that a certain employee's dismissal constituted an unfair labour practice and we must ask ourselves whether there is a cause-effect relationship between Miss Duval's union activities and her dismissal. ..."

(pages 61-62; emphasis added)

In Kleysen Transport Ltd. (1990), 82 di 1 (CLRB no. 817), the Board held, after considering the strong evidence presented by the employer to refute the presumption under section 98(4) that the employer's decision to withdraw the owner/operator contract offer from the complainant was not tainted with anti-union motives but rather resulted from the complainant's carelessness. (See also Global Forwarding Company Limited (1991), 85 di 152; and 91 CLLC 16,042 (CLRB no. 878), where the Board found that the complainant was dismissed because of his dishonest behaviour and not because of his union activities.)

In Canadian Imperial Bank of Commerce, Gibsons, B.C. (1978), 27 di 748 (CLRB no. 133), the complainant alleged that the Bank's decision to dismiss her violated section 94(3) of the Code and was "a natural consequence of the anti-union sentiment which he revealed to the members of the bargaining unit during the 'captive audience meeting' on June 16, 1977" (page 758), seven months before the complainant's dismissal. For its part, the employer submitted that its decision to dismiss the complainant was based on economic considerations. It is to be noted that the complainant had refused an offer to be transferred to another branch. After examining the employer's reasons to dismiss the complainant rather than another employee who had the same seniority, the Board decided that the employer was justified in

dismissing that particular employee and had not violated the Code. See also Transvision Magog Inc. (1981), 43 di 56 (CLRB no. 298), another decision where the employer used economic considerations to justify its actions, and Transport Papineau Inc., *supra*, another illustration (similar to Transvision Magog, *supra*) that the Board's determination pursuant to section 94(3) is often made by examining the motive for each employer action and not necessarily in evaluating the employer's general behaviour. In the latter decision, two complainants alleged that they had been dismissed contrary to section 94(3)(a) of the Code. In the case of one employee, the Board found that the complainant had been dismissed not for exercising rights under the Code but for other reasons and, in the second case, the Board decided that the severity of the disciplinary action revealed that it was motivated by anti-union animus.

Finally, the Board's decision in Québec Aviation Limitée (1985), 62 di 41 (CLRB no. 522), shows that the employer can rebut the strong onus by showing sound business reasons as part of its proof against anti-union animus. In that case, the employer had laid off two pilots following the cancellation of certain routes, and the union alleged that the employer's actions were motivated by anti-union animus. The Board found that the evidence supported the employer's position that its decision was based solely on economic considerations and concluded that *"there were sound business reasons for laying off the two employees in question and it was not anti-union animus which resulted in the decision by the employer"* (page 61).

ANTI-UNION ANIMUS IN THIS CASE

We see from the review of the above cases that the employer must demonstrate that its actions were not tainted by anti-union animus. It is with this test in mind that we examine the actions of the employer as shown by the evidence given in this case.

Mr. Hildebrant arrived at the employer's Vancouver terminal on January 26, 1990. Several people figure prominently in this case, and identifying some of them at the Vancouver location aids in our understanding of the events. The Manager, Pacific

Region, was Jon Samson Jr. He was the chief manager in the context of this complaint. He reported to Dennis Engel, Vice-President and General Manager, posted in Winnipeg. Reporting to Mr. Samson were Operations Manager Mr. T. Comeau, an administration manager and a sales manager. Reporting to Mr. Comeau were four dock supervisors and one or two dispatchers. It is notable that the employer applied to have the dock supervisors included in the bargaining unit on the basis, inter alia, that although they can write up incidents, they cannot decide on or impose discipline nor recommend hiring or firing (union documents, Exhibit A-2(K)).

The employee's first six months of employment at that terminal were uneventful. However, in one month, August 1990, the employer recorded seven incidents of varying seriousness on Mr. Hildebrant's personnel file. In one of these incidents, the employer had alleged alcohol use. September 1990 appeared clear of incidents, but one more appears on October 1, 1990 (see Exhibit R-3). Mr. Hildebrant clearly denied all of these allegations, and wrote a letter indicating his point of view to the employer (Exhibit R-4). As the work place was not then unionized, no grievance could have then been filed by Mr. Hildebrant.

What is notable about Mr. Hildebrant's work history to that date is that the employer did not terminate Mr. Hildebrant at that time, even though alcohol use was alleged; furthermore, the employer permitted him to continue to operate the fork lift for the balance of his shift. The employer, in a letter dated November 16, 1990, reiterated its concerns about Mr. Hildebrant's conduct, but offered to discuss matters further with him and ended the letter as follows:

"... We wish to make you comfortable and to forge a good working relationship for the future."

(Exhibit R-5)

We contrast the concern and forbearance on the employer's part during this round of discipline with its attitude and actions surrounding its later discipline and termination of Mr. Hildebrant in examining the employer's conduct in order to assess whether it was tainted by any anti-union animus.

Mr. Hildebrant's employment record was clear for a 19-month period between November 1990 and June 1992. In 1992 there was only one incident, July 17, which involved alleged loading errors and which resulted in an admonition to "take more care" (Exhibit R-6). It did not appear that the progressive discipline system of the employer was continuing to run against Mr. Hildebrant by this time.

In the spring of 1993, two notable events occurred in close proximity to one another. The first was the unionization bid by employees at the work place. On March 3, 1993, the employer became aware, by means of a Board posting, that the union on behalf of a group of employees had filed an application for certification. An organizing drive had been going on in February 1993. Mr. Hildebrant had signed his membership card with the union on February 26, 1993 and had played a large part in the recruitment into membership of other employees. On March 8, 1993, Mr. Hildebrant told Mr. Engel that he was the union organizer at the work place. The second event at this time was the resurgence of disciplinary activity by the employer vis-à-vis Mr. Hildebrant.

On March 9, 1993, the employer had a meeting with Mr. Hildebrant to discuss several incidents. The dates of those incidents were March 3 (insubordination), February 10 (error in releasing freight without collecting the charges), February 15 and 24 (errors) and March 8 (Mr. Hildebrant's perception of being harassed). The employer, at this meeting, raised concerns about the "mental health" of Mr. Hildebrant. These concerns were, to some extent at least, shared by Mr. Hildebrant in that he was feeling under great stress at that time. While the employer did offer a long-term medical option and support during counselling to Mr. Hildebrant, the letter did warn him that his "continuing employment will be in jeopardy" if correction was not made or counselling obtained (Exhibit R-7).

Evidence was given as to other statements which were made concerning Mr. Hildebrant around that time. Employee Raymond Yee testified that in mid-March, Supervisor John Sampson Sr. told him [Raymond Yee], "Stay away from Brad; you wouldn't want to get caught up in this". Employee Roberts testified that Supervisor Samson Sr. told him, again in mid-March, "It's too bad they're picking on Brad". Employee William Yee testified that Supervisor Abrey told him, "Stay away from Brad - he's going to get into trouble".

After considering the evidence adduced to that point, we find that, in respect of the March 9 meeting, it was out of character for the employer not to have documented each incident separately as they occurred and not to have brought them to Mr. Hildebrant's attention closer to the time of each alleged occurrence, in accordance with its practice in 1990 and its disciplinary procedures manual. We also have evidence of the statements made during March 1993, related above, the credibility of which was not shaken.

By letter dated June 30, 1993 the employer again expressed concerns about Mr. Hildebrant's work performance in an omnibus fashion. The incidents described in that letter allegedly took place on March 12, 22 and 26, and April 8. The letter was written immediately after a strange telephone call Mr. Hildebrant had made to a fellow employee telling her she was about to be laid off. As a result of this letter, the complainant received a five-day suspension, a warning of dismissal and a reminder that if it were necessary, he should seek "psychiatric counselling" (Exhibit R-8). The evidence at the hearing cast doubt on at least one of these incidents, the March 12 matter, as being worthy of discipline. The employer was again uncharacteristically slow in disciplining an employee for allegedly important incidents, especially in respect of incidents supposedly meriting a suspension.

On November 3, 1993, Mr. Hildebrant received a 10-day suspension ostensibly for a loading error. This suspension notice also contained a directive to "acknowledge"

the notice or be terminated. Mr. Hildebrant acknowledged it but indicated he thought the suspension excessive (Exhibit R-9).

We do not construe this acknowledgment by Mr. Hildebrant as an admission that he had reached the penultimate step of the progressive discipline hierarchy. Evidence produced at the hearing showed that the employer inconsistently treated employees guilty of making this type of error. Some employees are not disciplined for these types of errors at all. It is our view that the use of this type of error to found a serious suspension is suspicious to the point of begging some other motive on the employer's part.

There was also a great deal of evidence given by Mr. Hildebrant about a change in the attitude of the employer toward him as demonstrated by his supervisors watching him very closely. In one incident, his supervisor moved certain storage containers that had long obscured their view, so that they could better keep an eye on him. Mr. Hildebrant testified that he was isolated by the employer and assigned to work alone, instead of being part of a three-person shift, as had formerly been the practice. Mr. Hildebrant began, in the form of a self-designed "customer survey," collecting positive comments about his work and behaviour. When he began soliciting these comments from customers, the employer told him to cease doing an unauthorized "survey." Following a somewhat heated exchange between himself and Operations Manager Comeau, Mr. Hildebrant discontinued the "survey" the following day. Mr. Hildebrant also admits to having made some ill-advised telephone calls. Although a great deal of evidence was given by both parties in respect of these calls, in the final analysis they amounted to nothing more than what Mr. Hildebrant himself acknowledged them to be, namely ill-advised and in some cases, regrettable. In the Board's view they were strange or bizarre, but Mr. Hildebrant appeared to us to be a demonstrative individual given to exaggerated behaviour, although a credible witness. The employer knew the individual it was dealing with in Mr. Hildebrant and can be expected to govern its affairs accordingly. We do not find on a totality of the

evidence that Mr. Hildebrant's behaviour had become markedly erratic to the extent of justifying a change in employer supervision.

Other evidence points to an unexplained focussing on Mr. Hildebrant's employment status. At an employee meeting in October 1993 (the first in recent memory) to discuss the termination of another employee, Jon Samson Jr. put Mr. Hildebrant's disciplinary record on an overhead projector. In reviewing it with the staff in attendance, he said, "We could terminate him [Hildebrant] now, but we're not going to" (testimony of William Yee and Brad Hildebrant). Mr. Hildebrant further testified that supervisor Ron Abrey told him (after his suspension in November), "They were a little harsh on you, eh?" ... "The company is out to get you." ... "Let's just say they're watching you."

Mr. Hildebrant was then terminated on November 30, 1993 by letter dated December 3, 1993 (Exhibit R-10). This dismissal was ostensibly for excessive time used to load a trailer on November 24, accompanied by a reference to insubordination. Again, we do not find that the employer's explanation about the seriousness of the loading matter warranted the ultimate step in the progressive discipline hierarchy. We make this finding not in the sense of determining the just cause of dismissal, but in the sense of the employer's usual practice at the work place, on the evidence heard and exhibits submitted at the hearing. The decision to use this incident as the ultimate step in the progressive discipline hierarchy, in the context in which it was taken, begs of some other motivation than simply the management of the work place.

CONCLUSION AND FINDING

The evidence leads us to conclude that the employer has not discharged the onus in disproving that anti-union animus played at least a partial role in the increasingly abrupt treatment of Mr. Hildebrant and his ultimate termination. The employer changed its position from wanting to work with Mr. Hildebrant, and seemingly accepting him as he was, to keeping a close watch on and micro-managing him. The

employer suddenly reinstituted the progressive discipline system vis-à-vis Mr. Hildebrant at a time when Mr. Hildebrant was visibly a union organizer. While Mr. Hildebrant was not a model employee, the employer knew this and had worked with Mr. Hildebrant's style of operation. The employer could not suddenly expect that Mr. Hildebrant had become a different person than he was.

The purpose of the proscription against the employer treating negatively or prejudicially those who avail themselves, for themselves or others, of the rights under the Code stems from the very imbalances evident in this case. The employer has the right to manage the work place, and can supervise, discipline and exert pressure on the employees. If that supervision changes or if the pressures increase coincidentally with some employees attempting to avail themselves of rights under the Code, the perception of other employees is often that to use the Code is to risk one's livelihood. If employees perceive that certain negative or prejudicial treatment was motivated in whole or in part by their legitimate use of the Code, and the employer cannot establish, to the Board's satisfaction, that its actions were reasonably taken for other purposes, then the Board must ensure that all employees feel free to legitimately use the Code for its stated purposes. We feel so duty-bound in this case.

Given the weight of the presumption established in section 98(4) and our sense of the evidence as a whole, we find, on the balance of probabilities, that the employer's conduct was tainted by anti-union animus. Consequently, the employer did not discharge the burden of proof imposed on it by section 98(4) and the complaint must be upheld.

REMEDY

The Board has been granted broad remedial powers under section 99 of the Code to allow it to take remedial action to correct wrongs inflicted by unlawful acts by employers. These powers include:

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 50, 69, 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

...

(c) in respect of a failure to comply with paragraph 94(3)(a), (c) or (f), by order, require an employer to

(i) employ, continue to employ or permit to return to the duties of his employment any employee or other person whom the employer or any person acting on behalf of the employer has refused to employ or continue to employ, has suspended, transferred, laid off or otherwise discriminated against, or discharged for a reason that is prohibited by one of those paragraphs,

(ii) pay to any employee or other person affected by that failure compensation not exceeding such sum as, in the opinion of the Board, is equivalent to the remuneration that would, but for that failure, have been paid by the employer to that employee or other person, and

(iii) rescind any disciplinary action taken in respect of and pay compensation to any employee affected by that failure, not exceeding such sum as, in the opinion of the Board, is equivalent to any financial or other penalty imposed on the employee by the employer;

...

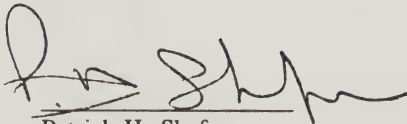
(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

The Board therefore declares that Atomic Transportation System Inc. contravened section 94(3)(a) of the Code and orders it to comply with this section. Pursuant to the remedial power described above, the Board further rescinds for all purposes Mr. Hildebrant's dismissal of November 30, 1993 and orders that the complainant Mr. Hildebrant be reinstated, with full compensation. Mr. Hildebrant shall be reinstated in his duties not later than September 1, 1995 or on any other date agreed to by the parties.

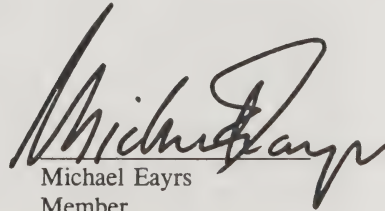
The Board appoints Mr. Harvey Farysey, Acting Regional Director of its Vancouver office, or any officer he might designate, to assist the parties in implementing the present decision. Finally, the Board retains jurisdiction, under section 20(1) of the Code, to take any further remedial action that may prove necessary and to settle any problem that may arise between the parties in implementing this decision.



Jean L. Guilbeault, Q.C./c.r.
Vice-Chair



Patrick H. Shafer
Member



Michael Eayrs
Member

information

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Summary

Teamsters Local Union No. 31, *applicant*,
and Atomic Transportation Inc., *respondent*.

Board File: 530-2232
CLRB/CCRT Decision no. 1137
October 23, 1995

(Reconsideration of decision issued in
certification file 555-3555)

Résumé

Section locale 31 du syndicat des Teamsters,
requérante, et Atomic Transportation Inc.,
intimée.

Dossier du Conseil: 530-2232
CLRB/CCRT Décision n° 1137
le 23 octobre 1995

(Réexamen de la décision rendue dans le
dossier d'accréditation 555-3555)

This decision deals with an application for
reconsideration pursuant to section 18 of the
Canada Labour Code (Part I - Industrial
Relations) of a Board decision to dismiss a
certification application.

This matter was first reconsidered by the
Board sitting in plenary session (CLRB
decision no. 1064) and returned to the original
panel for final determination. The Federal
Court of Appeal, however, set aside the full
Board's decision (and, consequently, the
original panel's subsequent decision) because
the Board had failed to notify certain
employees of the application for
reconsideration.

On July 17, 1995, after notifying the parties
and employees concerned and affording them
the chance to make representations, the full
Board considered the matter again. As in
CLRB decision no. 1064, the full Board
reiterates the Board's long-standing practice in
certification applications to ascertain the
wishes of the employees by way of
membership cards as of the date of the
application. The Board's discretion to order a

Il s'agit d'une demande présentée en vertu de
l'article 18 du Code canadien du travail
(Partie I - Relations du travail) en vue de faire
réexaminer une décision rendue par le Conseil
de rejeter une demande d'accréditation.

L'affaire a d'abord été réexaminée par le
Conseil siégeant en séance plénière (décision
du CCRT n° 1064) et a été renvoyée au banc
initial aux fins de décision. La Cour d'appel
fédérale a toutefois annulé la décision du
Conseil réuni en séance plénière (et par
conséquent la décision du banc initial) parce
que le Conseil n'avait pas avisé certains
employés de la demande de réexamen.

Le 17 juillet 1995, après avoir avisé les
parties et les employés visés et leur avoir
donné la possibilité de présenter des
observations, le Conseil a examiné la question
de nouveau. Tout comme dans la décision
n° 1064, le Conseil au complet a réitéré sa
pratique de longue date en matière de
demandes d'accréditation: déterminer les
désirs des employés au moyen des cartes
d'adhésion à la date de la demande. Aux

vote pursuant to section 29(1) should only be exercised in special circumstances such as particular raid applications, alleged unfair labour practices, where it suspects that union membership evidence is tainted or irregular, and, very exceptionally, where a considerable amount of time has passed between the date of application and the date of the Board's decision.

The application for reconsideration is allowed, and the matter referred to the original panel for final determination in accordance with the Board's practice and policy.

termes du paragraphe 29(1), le Conseil ne devrait exercer son pouvoir discrétionnaire d'ordonner un scrutin que dans des circonstances extraordinaires, telles que maraudages et présumées pratiques déloyales de travail, où le Conseil soupçonne que la preuve d'adhésion est viciée ou comporte des irrégularités et, exceptionnellement, lorsqu'une période de temps considérable s'est écoulée entre la date de la demande et la date de la décision du Conseil.

La demande de réexamen est accueillie, et l'affaire est renvoyée au banc initial pour qu'il rende une décision en conformité avec les pratiques et la politique du Conseil.

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Reasons for decision

Teamsters Local Union No. 31,

applicant,

and

Atomic Transportation System Inc.,

respondent.

Board File: 530-2232

CLRB/CCRT Decision no. 1137

October 23, 1995

This matter was considered by the full Board meeting in a plenary session on July 17, 1995 in Ottawa.

The Board was comprised of J.F.W. Weatherill, Chairman, L. Doyon, J.P. Morneault, R.I. Hornung, Q.C., J.L. Guilbeault, Q.C. and S. Handman, Vice-Chairs, and C. Davis, M. Eayrs, F. Bastien, M. Rozenberg, P. Shafer, V. Marleau and S. FitzGerald, Members.

Appearances (on record)

Mr. Don Davies, for the applicant trade union;

Messrs. C. Donald MacKinnon and William B. McAllister, for certain employees;

Mr. Barry Y.F. Dong, for the employer.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

I

The material facts of this matter, up until the time of the issuance of CLRB decision 1064 (Atomic Transportation System Inc. (1994), 94 di 48 (CLRB no. 1064), a decision of the full Board dated May 16, 1994), are succinctly set out in the reasons therein, which were prepared by Vice-Chair J.P. Morneault and are as follows:

"The facts may be briefly summarized as follows. On March 3, 1993, the Union applied for certification to represent a unit of employees of Atomic Transportation System Inc. (hereinafter the 'employer'). There were 32 employees in the unit proposed by the union, and the application was supported by signed applications for membership cards of well in excess of 50% of the members in said unit.

As provided by section 10(2) of the Board's Regulations, the employer was directed by the Board to post in various areas of its premises the 'Notice to Employees' to inform the employees that an application for certification had been filed on March 3, 1993. The notice also describes the manner and the time for intervening.

Following that posting, the Board received on March 12 and 15, 1993 a certain number of form letters signed by employees in the unit, expressing their wish not to be represented by the union or a change of mind and requesting a representation vote. However, these employees did not seek intervenor status pursuant to section 12 of the Board's Regulations.

These letters (or petitions) were treated in a confidential manner, in accordance with the Board's practice and section 25 of its Regulations. Consequently, none of the parties was notified of these letters. The employees concerned were informed that their petition (referred to in the acknowledgment letter of the labour relations officer as a 'reply') would be referred to the Board for its confidential information and that they would be advised should a hearing be scheduled.

The labour relations officer, following standard procedures, investigated the matter, including the wishes of the employees at the date of the application and the appropriateness of the proposed bargaining unit, and forwarded his investigation report to the Board and the parties on May 5, 1993. Part of this report dealing with union support and membership evidence was kept confidential in accordance with section 25 of the Board's Regulations. On June 10, 1993, the Board received a letter from C. Donald MacKinnon, counsel representing the employees who had already requested a representation vote and other employees sharing the same view. Mr. MacKinnon essentially reiterated the request for a representation vote.

On July 5, 1993, the Board panel which dealt with this application determined that the appropriate unit was different from the one sought by the applicant. This had the effect of raising the number of employees in the unit to 42 instead of the 32 sought. (This aspect of the decision was not challenged by anyone.) The panel also decided:

'Having reviewed all of the documentation on file, the Board has ordered that a representation vote be taken pursuant to Section 29(1) of the Code among the employees in the bargaining unit described above in order to ascertain whether or not these employees wish to be represented by Teamsters Local Union No. 31 union.'

On July 19, 1993, the Union applied for reconsideration of that decision [Board file 530-2216], mainly because it did not understand why a vote had been ordered since, by virtue of signed membership applications, it had a majority within the unit, even as expanded by the Board. This first application for reconsideration was dealt with in the regular course by a reconsideration panel of the Board. Unable to determine whether the original decision to order a vote was in fact made in the exercise of the Board's discretion provided under section 29(1) of the Code or in accordance with the mandatory requirement of section 29(2), the reconsideration panel referred the matter back to the original panel in order for it to complete a supplementary confidential review of the membership cards on file, and reach a decision in light of the Board's policy (letter dated August 10, 1993).

On August 20, 1993, the original panel maintained its original decision to order a vote, stating:

'After having considered a supplementary confidential review of the membership cards on file, the original panel has determined that its decision to order a vote had in fact been based on the discretionary right of the Board contained in Section 29(1) of the Code.

The original panel has also determined that its decision to invoke the discretion to order a representation vote was indeed justified by exceptional circumstances contained in confidential information on file, in accordance with the Board's policy with respect to the determination of employee support in certification applications.'

On September 13, 1993, the original panel, on the basis of the results of the representation vote, dismissed the application as it did not receive the support of the majority of the eligible voters who cast

ballots. It is this decision, based on the reasoning contained in the letter of August 20 quoted above, which forms the subject matter of this reconsideration application."

(pages 49-51)

II

The present reconsideration application (Board file no. 530-2232) was brought by the trade union following the dismissal of its application for certification, as described above. The application was processed in the usual way, and on November 24, 1993, the reconsideration panel, having studied the representations of the parties, concluded that the issues must be referred to the full Board, sitting in plenary session for determination pursuant to Board policy established in Curragh Resources and Altus Construction Services Ltd. (1987), 70 di 186; 18 CLRBR (NS) 233; and 87 CLLC 16,034 (CLRB no. 640), pages 188; 235; and 14,267.

The following questions were referred to the full Board:

1. Is the decision of the original panel in Board file no. 555-3555 one which is in accordance with the practice and policies of this Board?
2. If the answer to the first question is no, should the Board's practice and policy in this regard be expanded to include the additional considerations, if any, relied on by the original panel in exercising its discretion under section 29 of the Canada Labour Code?
3. If the answer to the question is no, what disposition should be made of this case?

In its decision, the reconsideration panel noted that,

"In its deliberations, the full Board had before it the complete certification file (555-3555), including the confidential reports, as

well as the complete reconsideration file (530-2232), including all submissions filed by the parties.

(Atomic Transportation System Inc., *supra*, page 49)

III

The Board met in plenary session on December 20, 1993, and arrived that day at the decision set out below. Reasons for Decision no. 1064 were issued on May 16, 1994. The three foregoing questions were answered as follows:

1. No it is not.
2. No it should not.
3. The file (555-3555) is referred back to the original panel for disposition in accordance with the Board's practice and policy.

On December 24, 1993, the original panel, further to the decision of the full Board, rescinded its decision to order a vote, and granted the application, certifying the applicant as bargaining agent for employees in the bargaining unit it had found to be appropriate, based on the membership evidence ascertained as of the date of the application.

Certain employees of the employer then brought an application for judicial review of the decision of December 24, 1993. That application was heard and granted by the Federal Court of Appeal on May 3, 1995. The reasons for judgment of the Court were prepared by Linden, J.A., and concluded as follows:

"This application will be allowed, and the decision of the Board dated December 24, 1993, with reasons dated May 16, 1994, will be set aside."

(Ian Raeburn et al. v. Canada Labour Relations Board, judgment rendered from the bench, no. A-40-94, May 3, 1995 (F.C.A.), page 4)

Strictly speaking, the reasons dated May 16, 1994 were not those which accompanied the decision of December 24, 1993, which was the decision of the original panel in the certification application (Board file no. 555-3555). They were the reasons for decision of the full Board in the reconsideration application (Board file no. 530-2232). The decision to certify, which was set aside, was made following the decision of the full Board in the reconsideration application, and the basis of the Court's decision was the lack of notice - in the reconsideration case - to the "certain employees" who had opposed the application for certification. In effect, the Court of Appeal set aside the decision of the full Board in the reconsideration case (the decision of December 20, 1993, with reasons issued on May 16, 1994) and, consequently, the decision to certify in the certification case, made on December 24, 1993.

Following receipt of the decision of the Federal Court of Appeal, the Board directed that notice of the reconsideration be posted to all employees. Counsel for the "certain employees" were advised that such notice would be posted. The notice was to the effect that the matter would be considered by the full Board. It was similar to the notice which had been provided to the parties to the application, that is, to the employer and the trade union. It described the material which would be before the full Board, and it provided an opportunity for the "certain employees" to make representations, and for the parties to comment thereon. Such representations and comments were made, and the full Board considered the matter on July 17, 1995. The same three questions were before the Board, and the Board's answers thereto were, as before:

1. No it is not.
2. No it should not.
3. The file (555-3555) is referred back to the original panel for disposition in accordance with the Board's practice and policy.

The parties (and counsel for the "certain employees") were advised of the Board's deliberation and of its decision in the matter on July 18, 1995. The reasons for our answers to the questions before us are the same as those which were elaborated in Decision no. 1064. To state this is, of course, in no way to reflect adversely upon the reasons for decision of the Federal Court of Appeal, whose reasons were directed to the matter of notice, and with which we have complied. We would add that as a result of what was said in the reasons for decision of the Federal Court of Appeal, the Board has undertaken a study of its notice procedures in all types of applications in the light of the Court's decision, with a view to revising those procedures where our review may show that to be necessary.

Our reasons are founded essentially on the provisions of section 28 of the Canada Labour Code which, although set out in decision no. 1064, may usefully be repeated here:

"28. Where the Board

(a) has received from a trade union an application for certification as the bargaining agent for a unit,

(b) has determined the unit that constitutes a unit appropriate for collective bargaining, and

(c) is satisfied that, as of the date of the filing of the application or such other date as the Board considers appropriate, a majority of

the employees in the unit wish to have the trade union represent them as their bargaining agent,

the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit."

In the instant case, as set out above, those criteria were met, and the Board would, in the usual course, have certified the trade union. The original panel, however, invoking section 29(1) of the Code (as its decision following the first reconsideration decision made clear), ordered a vote to be taken, despite the fact that it had found that the applicant trade union represented a majority of the employees in the bargaining unit.

Section 29(1) of the Code is as follows:

"29. (1) The Board may, in any case, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit."

It has, as was stated by the Board in decision no. 1064, been the long-standing practice of the Board in certification applications to ascertain the wishes of the employees by way of membership cards as of the date of the application. The history of this policy, and its reaffirmation by the Board following amendment of the Code to establish what is now section 28 in its present form, is set out in the above reasons. With respect to the exercise of its discretion under section 29(1) of the Code, the Board has "maintained that it would order representation votes only in special circumstances such as particular raid applications, alleged unfair labour practices, where it suspects that union membership evidence is tainted or irregular, and, very exceptionally, where a considerable amount of time has passed between the date of application and the date of the Board's decision" (Atomic Transportation System Inc., supra, at page 55). To summarize, as it was put at pages 56-57 of that decision,

"although the Board has the discretionary power under section 29(1) to order a representation vote even where the applicant union has demonstrated majority support, it has been the Board's long-standing practice and policy to exercise such discretion only where there are compelling reasons to question the reliability of the membership evidence" (Atomic Transportation System Inc., supra, pages 56-57).

In decision no. 1064, the Board concluded that the record "does not show on its face any of the special circumstances which would induce the Board to exercise its discretion under section 29(1) and to depart from its long-standing policy" (page 57). That same record, together with the representations made on behalf of the "certain employees", was before the Board on July 17, 1995 when, after notice to the parties and the employees, it considered the matter again.

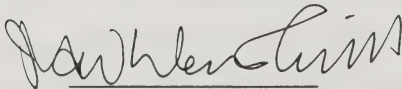
Counsel for the "certain employees" made lengthy submissions under three headings: (1) that there were now two unions applying for certification; (2) that there had been considerable delay since the membership cards were signed; and (3) that certain affidavit material indicated there had been intimidation by the applicant Teamsters union. As to (1), it is true that an application for certification was filed on May 12, 1995, by an organization known as the Atomic Transportation Employees Association. If we were to conclude that some other date than the date of application is the date as of which the evidence of membership in this case should be considered, then we would give further consideration to this submission. In the absence of such a conclusion (and for the reasons set out below we do not so conclude), the submission is irrelevant. It is for this reason that we do not now deal with the two certification applications at the same time. As to (3), the allegations of intimidation do not relate to the signing of the membership cards relied on by the applicant trade union in this application, but to subsequent events relating to the withdrawal of a previous application by the Atomic Transportation Employees Association. This matter, again, is irrelevant. As to (2), it is obvious that considerable time has now passed since the application was made. The employer, commenting on the arguments raised on behalf

of the "certain employees," suggested as well that the composition of the work-force had substantially changed in the interval between the application and the present time.

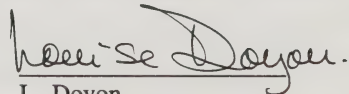
Delay, as the applicant union correctly points out in its response to the representations made on behalf of the "certain parties," was not a matter which the original panel could have relied on as a basis for ordering a representation vote. The Board might exercise its discretion under section 29(1) where the parties, and in particular the applicant (as was the case in Empire Stevedoring Co. Ltd. et al. (1981), 45 di 36 (CLRB no. 323)), create the delay, but in the instant case we agree with the applicant trade union that it would be manifestly unjust to prejudice the union because of the error in failing to give proper notice of the reconsideration by the full Board. It is our view, in all of the circumstances of the instant case, that sound labour relations principles and the encouragement of collective bargaining embodied in the Canada Labour Code require that the same answers be given now to the questions before us as were given in decision no. 1064.

Accordingly, the application for reconsideration is allowed, the answers to the questions before us are as set out above, and the matter referred to the original panel.


This is a unanimous decision of the Board.



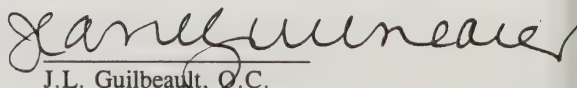
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Chairman



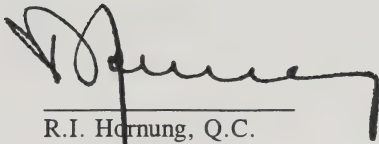
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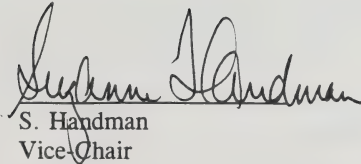
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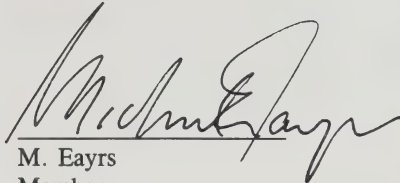
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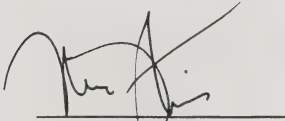
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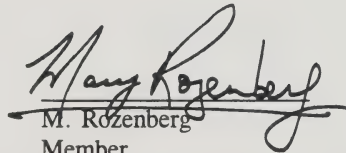
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Member



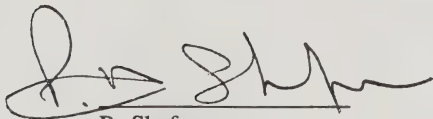
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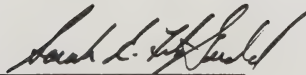
M. Rozenberg
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Member



S.E. FitzGerald
Member

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information

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Summary

Canadian Media Guild, Local 213 of the Newspaper Guild, *applicant*, and Reuters Information Services (Canada) Limited and Starfish Systems Inc., *respondents*.

Board Files: 560-325
585-562

CLRB/CCRT Decision no. 1138
September 15, 1995

These reasons for interim decision deal with preliminary objections to the Board's proceeding with applications pursuant to section 35 or alternatively sections 44 and 46 of the Canada Labour Code, Part I.

The respondent Reuters requests that the application be dismissed due to the length of time involved before bringing the application. The Board, in dismissing the request, held that the timing of a section 35 application is not a preliminary matter; it is an issue that the Board will consider in deciding whether or not to exercise its discretion and grant a single employer declaration.

In the case of the sale of business application pursuant to section 44 of the Code, different considerations apply. Given the automatic application of section 44, a delay in presenting an application to the Board does not constitute a bar to the determination of a sale in the future.

Résumé

La Guilde canadienne des médias, section locale de la Guilde des journalistes, *requérante*, et Reuters Information Services (Canada) Limited et Starfish Systems Inc., *intimées*.

Dossiers du Conseil: 560-325
585-562

CLRB/CCRT Décision n° 1138
le 15 septembre 1995

Les motifs de cette décision partielle traitent des objections préliminaires à ce que le Conseil traite des demandes présentées en vertu de l'article 35 ou des articles 44 et 46 du Code canadien du travail, Partie I.

L'intimée Reuters réclame du Conseil qu'il rejette la demande en raison du délai qui s'est écoulé avant qu'elle ne soit présentée. Le Conseil, rejetant cette réclamation, juge que le moment où une demande est présentée en vertu de l'article 35 ne fait pas l'objet d'une question préliminaire; il s'agit d'une question que le Conseil prend en compte lorsqu'il décide d'exercer ou non son pouvoir discrétionnaire et de faire une déclaration d'employeur unique.

En ce qui a trait à la demande fondée sur l'article 44 en vue d'obtenir une déclaration de vente d'entreprise, elle pose des questions différentes. En raison de l'application automatique de l'article 44, un retard à présenter une demande au Conseil ne constitue pas un obstacle à ce que ce dernier détermine ensuite qu'il y a eu vente.

Respondents Reuters and Starfish both requested that the Board dismiss the application presently before the Board or stay the proceedings pending the current arbitration proceedings allegedly dealing with the same dispute. Since the time this objection was raised, the arbitrator has rendered his decision. Notwithstanding this fact, the Board indicates that the present application does not constitute a complaint foreseen by section 97. Therefore this case is not a matter the Board can refuse to hear on the basis that it could be referred to an arbitrator pursuant to section 98(3) of the Code.

As for the respondents' request for a stay, given that the arbitration award has been issued, this question is now moot. Even if this was not the case, an arbitrator has no jurisdiction to determine a request for a single employer declaration or a declaration of a sale of business. These issues are properly before the Board and are for the Board to determine. Consequently, in this case, the ground raised by the respondents would not be a valid reason for the Board to stay the present proceedings.

The applicant has now asked the Board to adjourn the case since it is attempting to negotiate a settlement with Reuters which might resolve their dispute. Given this labour relations ground, the Board grants the adjournment requested.

Les intimées Reuters et Starfish ont toutes les deux demandé que le Conseil rejette la demande dont il était saisi ou sursoit à la procédure en attendant que soit rendue une décision à la procédure arbitrale portant sur le même conflit. Depuis que cette objection a été soulevée, l'arbitre a rendu sa décision. Quoiqu'il en soit, le Conseil indique que la présente demande ne constitue pas une plainte prévue par l'article 97. Il ne s'agit donc pas d'une question que le Conseil peut refuser d'instruire parce qu'elle pourrait être renvoyée à un arbitre en vertu du paragraphe 98(3) du Code.

En ce qui concerne la demande de sursis présentée par l'intimée, elle n'a plus de raison d'être puisque l'arbitre a déjà rendu sa décision. Même si ce n'était pas le cas, cependant, un arbitre n'a pas compétence pour trancher une demande de déclaration d'employeur unique ou de vente d'entreprise. Le Conseil a été correctement saisi de ces questions et il appartient au Conseil de les trancher. Par conséquent, le fondement invoqué par les intimés dans la présente affaire ne serait pas un motif valide pour que le Conseil sursoit aux procédures en cours.

Le requérant demande maintenant au Conseil d'ajourner l'affaire puisqu'il tente de négocier une entente avec Reuters qui pourrait résoudre leur conflit. Puisque la demande est fondée sur les relations de travail, le Conseil accorde l'ajournement.

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Reasons for decision

Canadian Media Guild, Local 213 of the
Newspaper Guild,

applicant,

and

Reuters Information Services (Canada) Limited
and Starfish Systems Inc.,

respondents.

Board Files: 560-325
585-562

CLRB/CCRT Decision no. 1138
September 15, 1995

The Board was composed of Ms. Suzanne Handman, Vice-Chair and
Messrs. Calvin Davis and François Bastien, Members.

Appearances (on record)

Aubrey E. Golden, Q.C., for the Canadian Media Guild, Local 213 of the Newspaper
Guild;

Mr. H.P. Rolph, for Reuters Information Services (Canada) Limited; and

Mr. Gordon A. Ullman, for Starfish Systems Inc.

These reasons for interim decision were written by Ms. Suzanne Handman,
Vice-Chair.

I

The Canadian Media Guild, Local 213 of the Newspaper Guild (the "Guild" or the "applicant"), filed an application pursuant to section 35 of the Code seeking a declaration that Reuters Information Services (Canada) Limited ("Reuters") and Starfish Systems Inc. ("Starfish") are a single employer for the purposes of Part I of the Code. In the alternative, the applicant seeks a declaration pursuant to sections 44 and 46 of the Code that there has been a sale of business from Reuters to Starfish and that Starfish is bound by the collective agreement subsisting between the applicant and Reuters.

Reuters and Starfish have raised two preliminary objections, namely the delay in bringing the application and secondly, the inappropriateness of the present proceedings given that the questions allegedly in dispute are being pursued through grievance and arbitration. These reasons deal with the respondents' request to dismiss the application presently before the Board or to stay the proceedings pending the arbitration.

II

As a preliminary matter, Reuters submits that the application should be dismissed due to the length of time involved before bringing the application. According to Reuters, the applicant has known about Starfish and the role played in that company by

Mr. Evestaff (a former manager of Reuters) since December 1992 but waited until January 1995 to file its application before the Board.

The applicant claims that it acted promptly. Initially, it filed a grievance pursuant to the collective agreement. It did so in December 1992 after it became aware that Reuters was contracting out to Starfish. The arbitration hearings with respect to this grievance began on November 18, 1994 and continued in January 1995 and subsequently. Although the applicant was aware that Mr. Evestaff, a former manager employed by Reuters, was involved in the running of Starfish, the applicant states it had no knowledge of the specific nature and extent of the relationship nor the actual contractual arrangements between the two companies until late 1994 when it obtained this information during the arbitration proceedings. It also claims that other aspects concerning the extent to which Reuters and Starfish are related became clear to it over a period of time. The applicant submits that once it became fully appraised of the situation between Reuters and Starfish, it promptly filed the present application.

III

No delays are foreseen by the Code for filing an application pursuant to section 35.

This does not mean that the time an application is presented to the Board is irrelevant.

Parties coming before the Board are expected to act with due diligence. Where this is not the case, a request for a single employer declaration may be refused.

However, the timing of a section 35 application is not a preliminary matter; it is a question that the Board will consider in deciding whether or not it will exercise its discretion and grant a single employer declaration. Evidence of such an approach may be seen in the case of Calgary Television Limited and Lethbridge Television Limited (1977), 25 di 399; and [1978] 1 Can LRBR 532 (CLRB no. 118):

"The union submits the timing of a request for a declaration under section 133 should not be considered by the Board. We disagree. Its timing is directly tied to the purpose for which the declaration is sought. It is certainly crucial to the invocation of section 133 for the primary purpose for which it was enacted... In this case, its use could have had no other effect than disturbing the stable, long term relationship at Calgary. The Board did not and does not consider that effect to be in furtherance of the objects of the Code, therefore it affirms the original decision not to exercise its discretion under section 133."

(pages 405; and 537)

This decision was followed in Nolisair International Inc. (Nationair Canada) et al. (1992), 89 di 94 (CLRB no. 960). The Board dealt with the issue concerning the timing of the application in the context of the exercise of its discretion:

"The Board concluded that even if it found that Nationair and Sol-Air, or Nationair and M.Y., or Nationair and Servisair, constitute a single business and a single employer, it would not exercise the discretion conferred on it under section 35 and would not make a declaration to that effect. In reaching that conclusion, the Board took into account the following facts.

...

The union filed its application for a declaration on November 2, 1990, when it realized that the situation it had accepted in recent years was having consequences that it had perhaps anticipated, but that it had taken the risk of accepting. This acceptance itself created a factual situation that has consequences for third parties: employees, unions and employers. In this sense, the Board believes that the timing of the union's application is an important consideration in deciding whether to exercise its discretion. ...

...

The union had long been aware of the facts on which it relies in seeking the Board's intervention. Such was not the case in Music Mann Leasing Ltd., Bus Drivers (London) Inc. (1982), 51 di 51; and [1982] 2 Can LRB 337 (CLRB no. 381), in which the Board said the following:

'... [since] the union was kept in the dark until the contract was finally settled, we find that the union's delay in proceeding before the Board should not influence us in the exercise of our discretion.'

(pages 57; and 342)

The Ontario Labour Relations Board has also considered the question of the timing of an application. In Andreynolds Company Limited, [1990] OLRB Rep. Nov. 1107; and (1990), 10 CLRBR (2d) 130, the Ontario Board reiterated the following:

'33. ...The Board's refusal to exercise its discretion in favour of a section 1(4) applicant by reason of the applicant's delay is well established. ...

34. The past jurisprudence of the Board does address the issue in terms of whether the union knew or ought reasonably to have known. The Board's past jurisprudence has also imposed a "due diligence" test on trade unions and their representatives. ...'

(pages 1113; and 138)

For these reasons, there is no need for this Board to decide whether Nationair and the other employers involved are a single business and a single employer because, even if it were to answer yes to this question, the Board, given the circumstances of this case, would not make a section 35 declaration."

(pages 114-117; emphasis added)

Accordingly, while the respondents in the present case may question whether the applicant has acted with reasonable diligence in presenting its section 35 application, this is not the appropriate stage of the proceedings to do so.

IV

As in a section 35 application, no delays are foreseen by the Code for filing a sale of business application pursuant to section 44 and following. Notwithstanding the absence of time limits, different considerations apply in this instance.

In contrast to other sections of the Code, section 44 applies automatically, without the Board's intervention. With the occurrence of a sale of business, successor rights and obligations are automatically transferred to the acquiring employer. The Board does not intervene unless the existence of the sale or the identity of the purchaser is in issue, or an application is made pursuant to section(s) 44 and/or 45(1) by an affected union. (See Reimer Express Lines Limited et al. (1973), 1 di 12; and 74 CLLC 16,093 (CLRB no. 1); Seaspan International Ltd. (1979), 33 di 544; and [1979] 2 Can LRBR 493 (CLRB no. 196); and Autocar Connaisseur Inc. and Murray Hill Limousine Service Ltd. (1988), 76 di 139 (CLRB no. 723).)

The automatic operation of a sale of business has been confirmed by the Supreme Court of Canada in the case of U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048,

with respect to a sale of business pursuant to section 45 of the Quebec Labour Code.

This is evidenced by the following passage:

"The first point to be mentioned is that the application of s. 45 does not result from the commissioner's determination that the requirements of that section have been met. Section 45 applies automatically. The transfer of rights and obligations occurs as of right on the day of the alienation, operation by another or change in legal structure of the undertaking. ..."

(page 1091)

Given the immediate and automatic application of section 44 of the Code, a delay in presenting an application to the Board does not preclude the Board from making a determination with respect to any question arising under sections 44, 45, or 46. The finding of a sale is not restricted to the time of the actual sale but may be made at a considerably later date. As the Board stated in the case of Halifax Grain Elevator Limited (1991), 85 di 42; 15 CLRBR (2d) 191; and 91 CLLC 16,033 (CLRB no. 867), the failure of a party to file an application under section 44 does not constitute a bar to the determination of a sale in the future:

"...under the Code, section 44 operates automatically, contrary to section 45 which requires an application. The fact that a party fails to file an application under section 44 or is prevented from doing so is not a bar to such a determination in the future. The Board cannot ignore nor the parties escape the consequences of a sale of business when the evidence establishes that a sale has occurred.

Further, section 46 of the Code reads:

'46. Where any question arises under section 44 or 45 as to whether or not a business has been sold or as to the identity of the purchaser of a business, the Board shall determine the question.'

As evidenced in Board case law, a finding of sale may be made years after the actual fact when proof is actually adduced before the Board establishing its occurrence (see Bradley Services Ltd. et al. (1986), 65 di 111; 13 CLRBR (NS) 256; and 86 CLLC 16,036 (CLRBR no. 570))."

(pages 47-48; 196-197; and 14,393)

In light of the foregoing, there is no basis to dismiss a section 44 application on the ground submitted by the respondents, namely the alleged undue delay.

V

Reuters and Starfish have both raised an objection to the application on the ground that the applicant has elected to pursue its rights through grievance and arbitration. The issue in dispute, described by the respondents, is over the interpretation of the current collective agreement and the right of Reuters to subcontract thereunder. The respondents submit that it would be inappropriate for the parties to deal with the same disagreement by means of parallel proceedings and for this reason they request that the Board dismiss or stay the application.

Since the time that the foregoing objection was raised, on August 5, 1995 Arbitrator Joyce rendered his decision with respect to the above-mentioned grievance. In the absence of parallel arbitration proceedings, the request to dismiss the application is now without purpose.

Notwithstanding the foregoing, it is important to note that not all cases can be deferred to arbitration. The Board, pursuant to section 98(3) of the Code, has discretion to refuse to hear an application when it considers that the matter could be referred to an arbitrator. Section 98(3) states:

"98.(3) The Board may refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."

The applications that the Board can refuse to hear and refer to arbitration are those complaints set out in section 97 of the Code, namely alleged contraventions of subsection 24(4), or 34(6), or sections 37, 50, 69, 94, 95, and 96.

The present application, seeking a common employer declaration, filed pursuant to section 35 of the Code, or alternatively a declaration of a sale of business filed pursuant to sections 44 and 46 of the Code, does not constitute a complaint foreseen by section 97 of the Code. Therefore, irrespective of the status of the arbitration proceedings, this case is not a matter that the Board can refuse to hear and determine on the basis that it could be referred to an arbitrator.

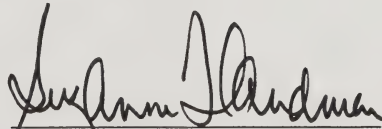
As for the respondents' request to stay the application, this issue is now moot given that the arbitration award has been issued. The Board nevertheless wishes to make the following comments.


The Board has discretion pursuant to section 16(l) of the Code to stay its proceedings. The question of whether or not the Board should stay its proceedings has usually arisen where the question before it is concurrently before a court.

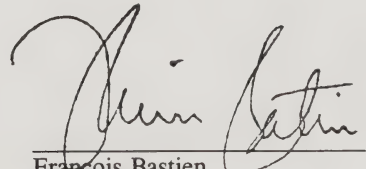
In the present case, there is no court challenge and the arbitration award has been rendered. Even if this was not the case, the request for a single employer declaration or a declaration of a sale of business was not considered in the arbitration proceedings, nor could it be. An arbitrator does not have jurisdiction to determine such questions. The application is properly before the Board and is one for the Board to determine. Consequently, in this case, the ground raised by the respondents would not be a valid reason for the Board to stay the present proceedings.

VI

The Board has since been asked by the applicant to adjourn the case as the applicant and Reuters are presently attempting to negotiate a settlement which might resolve their dispute. The Board considers that it is in the labour relations' interests of the parties to reach an agreement. The Board accordingly grants the request for adjournment. The file will be kept in abeyance for a period of ninety days after which the parties are to advise the Board as to their intentions with respect to the continuation of the proceedings.


Suzanne Handman
Vice-Chair


Calvin Davis
Member

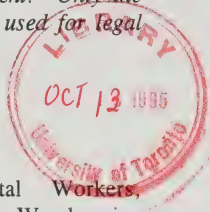

François Bastien
Member

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Summary

Résumé

Canadian Union of Postal Workers, *complainant*, and Canada Warehousing Services, a Division of Canada Messenger Transportation Systems Inc., *respondent*.

Syndicat des postiers du Canada, *plaignant*, et Canada Warehousing Services, une division de Canada Messenger Transportation Systems Inc., *intimée*.

Board File: 745-5020
CLRB/CCRT Decision no. 1139
September 12, 1995

Dossier du Conseil: 745-5020
CLRB/CCRT Décision n° 1139
le 12 septembre 1995

The union claims that the employer committed an unfair labour practice, contrary to sections 94(1)(a) and 94(3)(a)(i) of the Canada Labour Code (Part I - Industrial Relations). The union lost the representation vote held in respect of its application for certification. Two days later, the employer transferred an employee who was a known supporter of the union to the night shift, for a period approximating two months. The union claims the employer did so to hinder further organizing efforts and to encourage the employee to quit.

Le syndicat prétend que l'employeur s'est rendu coupable de pratique déloyale de travail, en violation de l'alinéa 94(1)a) et du sous-alinéa 94(3)a)(i) du Code canadien du travail (Partie I - Relations du travail). Le syndicat avait perdu le scrutin de représentation tenu dans le cadre de sa demande d'accréditation. Deux jours plus tard, l'employeur a transféré au quart de nuit, pour une période d'environ deux mois, un employé réputé être un partisan syndical. Le syndicat prétend que l'employeur a agi ainsi dans le but de miner les tentatives de syndicalisation et d'inciter l'employé à démissionner.

The Board reiterated principles and Board policy applying to cases of alleged employment discrimination because of an employee's support for a union.

Le Conseil a réitéré les principes et sa politique applicables aux cas de présumée discrimination dans l'emploi parce qu'un employé appuyait un syndicat.

The Board found that the employer's stated reasons for the transfer were not supported by the evidence. It concluded the employer had not discharged the section 98(4) burden of proof applying to section 94(3) complaints and that the employer had also violated section 94(1)(a). It ordered that the employer cease interference with union and employee rights,

Le Conseil estime que les raisons invoquées par l'employeur pour justifier le transfert ne sont pas étayées par la preuve. Il conclut que l'employeur ne s'est pas acquitté du fardeau de la preuve imposé par le paragraphe 98(4) et applicable aux plaintes fondées sur le paragraphe 94(3) et que l'employeur a enfreint l'alinéa 94(1)a). Il ordonne que l'employeur

and return the employee to his day-shift position with compensation.

cesse d'empiéter sur les droits du syndicat de l'employé et qu'il réintègre l'employé dans son poste de jour avec dédommagement.

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LES MOTIFS DE DECISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Canadian Union of Postal Workers,

complainant,

and

Canada Warehousing Services, a Division of
Canada Messenger Transportation Systems Inc.,

respondent.

Board File: 745-5020
CLRB/CCRT Decision no. 1139
September 12, 1995

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Mr. Calvin B. Davis and Ms. Sarah E. FitzGerald, Members. A hearing was held on July 11 and 12, 1995 at Winnipeg, Manitoba.

Appearances

Mr. Gordon Fischer, Regional Grievance Officer, accompanied by Mr. Roger Wilson, for the complainant union; and

Mr. Benjamin R. Hecht, counsel, accompanied by Mr. Grant Heckle, Vice-President Sales and Marketing, for the employer.

These reasons for decision were written by Ms. Sarah E. FitzGerald, Member.

I

On February 28, 1995, the Canadian Union of Postal Workers (CUPW) filed a complaint alleging that the employer had contravened sections 94(1) and 94(3) of the Canada Labour Code (Part I - Industrial Relations). CUPW challenges the employer's

decision to transfer Roger Wilson from day-shift to night-shift work. On February 8, 1995, Mr. Kelly Rudkevitch, the employer's Warehouse Operations Supervisor, telephoned Mr. Wilson at home during his scheduled days off. He advised Mr. Wilson that upon his return to work Saturday, February 11, he would work night shifts for a period approximating two months. Two days prior to this telephone call, February 6, a representation vote had been conducted in respect of certain employees of Canada Warehousing including Mr. Wilson. The result, a 3:3 tie, was announced the day of the vote. The union had not established the required majority. The Board dismissed the certification application.

CUPW's certification application identified a bargaining unit of shunt and shuttle drivers working on the employer's TRANSCON contract with Canada Post Corporation. Mr. Wilson was a day shift shunt driver. He and CUPW believe that the decision to transfer him to night shift was motivated by the employer's awareness, which is not in dispute, that Mr. Wilson had supported CUPW's efforts. Processing CUPW's certification application had proven a lengthy matter. The results of a first representation vote were set aside upon the Board's finding that Mr. Grant Hekle, Vice-President Marketing, had conducted captive audience meetings shortly before that vote. See Canada Warehousing Services, a Division of Canada Messenger Transportation Systems Inc. (1995), as yet unreported CLRB decision no. 1104. On more than one occasion, Mr. Wilson had spoken of his support for CUPW in the presence of co-workers and supervisors. He had also discussed the matter directly with Mr. Hekle.

CUPW believes the employer had two objectives in mind when it transferred Mr. Wilson. The transfer would limit Mr. Wilson's exposure to other employees, in effect isolating him on the night shift with one other known CUPW supporter. This would hinder further organizing efforts at the work place that might lead to another certification application in six months' time. Secondly, CUPW claims that the employer knew that Mr. Wilson had announced to co-workers on a number of occasions, that he would quit if he were ever transferred to the night shift.

CUPW relies on the following provisions of the Code:

"94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; ...

...

(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union, ..."

Section 94(3) is a significant source of protection for those believing that an employer has taken action against them because they support a union. However, as discussed in Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600), the employer is usually the only party that really knows the reasons for its actions. It is for this reason that Parliament enacted section 98(4) to give meaning to these protections. Section 98(4) states:

"98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

Consequently, the employer bears the burden of proof and must satisfy the Board that anti-union animus did not influence in any degree, the decision to transfer Mr. Wilson. The Board's policy in these matters is discussed and summarized in Air Atlantic Limited, supra at pages 34-35 of 68 di and 16,002 of 87 CLLC:

"The law on the subject of discrimination against employees for having exercised rights under the Code is well settled. If a decision by an employer to take any of the actions prescribed in section 184(3)(a) [now 94(3)(a)] against the employee has been influenced in any way by the fact that the employee has or is about to exercise rights under the Code, then the employer's actions will be found to be contrary to the Code. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the Code ..."

If Mr. Wilson's past or anticipated participation in lawful union activities and the exercise of Code rights has influenced the employer's decision to transfer him, an unfair labour practice has been committed.

II

As it happened, Mr. Wilson did not appear for work on the night shift. He maintains that he did not resign, and that he advised Mr. Rudkevitch he remained available to work his regular day shift. Mr. Rudkevitch claims that Mr. Wilson resigned.

The Board does not find it necessary or appropriate in the context of this complaint, to attach a label of resignation or termination to the circumstances that brought Mr. Wilson's employment with this employer to a halt. Mr. Wilson wishes to resume his day shift work for Canada Warehousing. CUPW seeks to remedy the effects of what it believes to be a decision influenced by the fact of Mr. Wilson's support for a union. It is clear to us that, but for the decision to transfer Mr. Wilson, his employment would not have ended. For this reason, our inquiry in this case begins and ends with an examination of the reasons for the transfer. As discussed with the parties at the

hearing, this is an all-or-nothing case. If CUPW succeeds, the Board could, as CUPW desires, order that Mr. Wilson be returned to his day-shift position. However, if the employer satisfies the Board that its decision was not tainted by anti-union animus, the Board would be unlikely to order that Mr. Wilson at least be given an opportunity to return to work on the night shift.

III

To appreciate the employer's explanations for the transfer, a brief description of shunt driving and Mr. Wilson's work history with the employer is useful.

The employer operates a warehouse at 1500 Clarence Avenue in Winnipeg. Under the terms of the TRANSCON contract, the employer receives and unloads monotainers of mail arriving by highway transport trailer. Monotainers are grouped according to destination and loaded back into trailers for highway transport. Shunt drivers shift the transport trailers around the warehouse yard so that they may be loaded and unloaded. Shunt drivers are frequently called upon to back up trailers into designated loading bays.

Mr. Wilson had worked as a day-shift shunt driver since the TRANSCON contract work began in July 1993. The one exception was a two-week night-shift assignment he took in summer 1994, at another of the employer's warehouse locations.

When Mr. Rudkevitch telephoned Mr. Wilson on February 8, 1995, he advised that the transfer was necessary because the employer had to train a new shunt driver on the day shift. The evidence revealed that the new shunt driver was Mr. McKenzie; a moving driver employed with "Canada Moving". Canada Moving is another Division of Canada Messenger Transportation Systems Inc., and is run by one of Mr. Grant Hekle's brothers.

Mr. Grant Hekle explained that his brother's operation, Canada Moving, has difficulty retaining good moving drivers because lay-offs are necessary whenever there is a drop in business. He had on occasion at his brother's request, employed a Canada Moving driver temporarily with Canada Warehousing as a sort of bridging measure. So it was to be for Mr. McKenzie. Mr. McKenzie did not testify, nor did anyone from management at Canada Moving.

Mr. McKenzie worked his first shift with Canada Warehousing the night of February 3, 1995. Arising from a Canada Warehousing lay-off on January 29, a night-shift shunt driver's position was vacant.

The night shift is the busiest for shunt drivers and Mr. McKenzie's performance was apparently unsatisfactory. He was, we are told, too slow in backing up trailers to the loading bays. Mr. Rudkevitch discussed Mr. McKenzie's performance with Mr. Grant Hekle some time on Monday, February 6 or Tuesday, February 7, but in any event, after the results of the representation vote were known. They discussed Mr. McKenzie for about 15 minutes and decided it was necessary that he be trained on the day shift. Mr. McKenzie was assigned to work the same schedule as day-shift supervisor Barry Hess. Of two day-shift supervisors (alternating "days ON" and "days OFF"), only Mr. Hess held a Class 1 licence. Mr. Rudkevitch and Mr. Hekle decided Mr. McKenzie should be trained by someone with a Class 1 licence.

Roger Wilson worked the same day-shift schedule as supervisor Barry Hess. As both Mr. Wilson and Mr. Hess were due to return to work on Saturday, February 11, Mr. Rudkevitch decided it was easiest to simply substitute Mr. McKenzie for Mr. Wilson during the training period, and Mr. Wilson would be transferred to the night shift. This would minimize disruption to the composition of the two sets of day-shift teams that alternated "days ON" and "days OFF". Each team consisted of a supervisor, lead hand, clerk, shuttle driver, and shunt driver.

Mr. Rudkevitch considers Mr. Wilson to be one of the more skilled shunt drivers whose efforts would be put to good use on the busy night shift. He did not anticipate that the transfer would cause any difficulty as Mr. Wilson had sufficient time during his scheduled days off (February 7-10) to ready himself for night work starting February 11.

Both Mr. Rudkevitch and Mr. Hekle maintain that there is nothing unusual in the decision to transfer Mr. Wilson. They say that Canada Warehousing has transferred employees between shifts on a number of occasions. Further, Mr. Wilson had worked a two-week night-shift assignment the previous summer at another warehouse location.

IV

CUPW challenges the employer's explanations in a number of ways. First, Mr. Wilson and another shunt driver gave uncontradicted evidence concerning training of new shunt drivers. They dispute that a Class 1 licensed trainer is required, or that two month's training could be necessary. Mr. Wilson says that he himself has trained shunt drivers in a day. It is the viewpoint of these two witnesses that, aside from demonstrating the use of the hydraulic fifth wheel (PTO) to a new driver, shunt driver training is more like an orientation. It is easily completed within at most a couple of days, and it is only through actually doing the job that the driver overcomes any difficulty, such as slowness in backing up trailers. They believe that within a week, any driver should be comfortable with and performing all aspects of the job well. Certainly CUPW says, this should have been the case for Mr. McKenzie, an experienced moving driver that Canada Moving was so anxious to keep employed.

At the time of the Board's hearing, approximately five months after Mr. McKenzie started working as a day-shift shunt driver, he continues in the position. He had not returned to night-shift work, or to employment with Canada Moving.

Second, CUPW says that the employer's prior transfers of employees between shifts were not imposed on the employees. Based on the evidence, we agree. The employer's usual practice is quite the opposite of that claimed. In several cases, the employee had requested the transfer or temporary assignment. In others, including Roger Wilson's prior two-week night-shift assignment, the employer approached and discussed the transfer with the employee, making attempts to accommodate any employee concerns. If the employee was unwilling to make the move, the employer first sought out other employees who might be interested. Imposing a transfer or assignment without any discussion, as occurred this time in Roger Wilson's case, is very much the exception to the rule.

The evidence establishes that Mr. Hekle knew Mr. Wilson well and that the two had discussed work matters on a number of occasions. Mr. Hekle testified to the frustration he felt at learning that Mr. Wilson, an experienced shunt driver, had left his job because of the transfer. However, Mr. Hekle made no effort to contact Mr. Wilson, or to urge Mr. Rudkevitch to find a solution. We do not find his reasons for the lack of action persuasive and conclude it represents inconsistent behaviour on Mr. Hekle's part.

Third, CUPW maintains that the claimed attempt to minimize disruption to day-shift teams does not hold up to scrutiny. We agree. The employer had not advised employees of this particular team concept, nor had a team schedule of the kind provided to the Board ever been posted in the work place. The team concept appears to have been introduced at the time of the events in question. Further, the evidence showed that the composition of the teams was not fixed. The clerks would change from time to time. On occasion, lead hands would trade shifts.

Finally, the Board notes certain matters from Mr. Hekle's testimony. Mr. Hekle was forthright in identifying certain employees including Mr. Wilson as CUPW supporters, and others as non-supporters. He stated that he was not opposed to unions in and of themselves, but that it was CUPW in particular he did not like. In light of these

remarks it is necessary to point out that the employees' choice of trade union is exactly that -- a choice made by the employees. The employer has no role to play in determining which union will represent the employees and bargain with the employer.

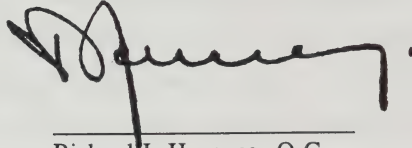
V

Based on the foregoing, the Board concludes the employer has not met the burden of proof imposed by section 98(4). The employer's stated reasons for the transfer are not established or credible in light of the evidence and the timing of the decision. We find and declare that the employer has violated section 94(3)(a)(i). We conclude further, that the employer's actions were taken in an attempt to interfere with a trade union, contrary to section 94(1) of the Code.

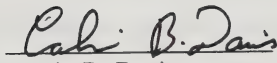
The Board orders:

1. that the employer cease and desist from interfering with the rights of employees and the union under the Code; and
2. that the employer reinstate Roger Wilson in the day-shift shunt driver position that he previously occupied within one week of the date of this decision, with no loss of wages and benefits, and compensate him for loss of earnings and benefits he would have earned from February 11, 1995 to the date of reinstatement.

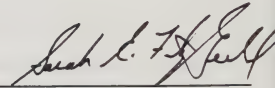
The Board appoints Mr. John Taggart, investigating officer at the Board's Regional Office in Winnipeg, to assist the parties in implementing the above order, and retains jurisdiction to deal with any matter in this regard that the parties cannot resolve.

A handwritten signature in black ink, appearing to read 'Richard I. Hornung', written over a horizontal line.

Richard I. Hornung, Q.C.,
Vice-Chair

A handwritten signature in black ink, appearing to read 'Calvin B. Davis', written over a horizontal line.

Calvin B. Davis
Member

A handwritten signature in black ink, appearing to read 'Sarah E. FitzGerald', written over a horizontal line.

Sarah E. FitzGerald
Member

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Summary

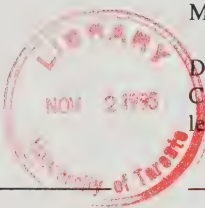
United Steelworkers of America, on behalf of Margaret Crowley, *complainants*, and Echo Bay Mines Ltd., *respondent*.

Board File: 745-5075
CLRB/CCRT Decision no. 1140
September 28, 1995

Résumé

Métallurgistes unis d'Amérique, au nom de Margaret Crowley, *plaignants*, et Echo Bay Mines Ltd., *intimée*.

Dossier du Conseil: 745-5075
CLRB/CCRT Décision n° 1140
le 28 septembre 1995



The union claimed that the employer had committed an unfair labour practice, contrary to sections 8, 94(1)(a), 94(3)(a) and 96 of the Canada Labour Code, when it had terminated Ms. Crowley, the complainant, for exercising her rights under the Code. Specifically, these rights included her supporting the union and encouraging her co-workers to do the same. The employer denied the allegation and maintained the complainant was terminated for just cause.

Ms. Crowley was adamantly opposed to changes brought about by the employer in the work place. As well, her comments in a letter to the employer could be considered insubordinate.

The Board however had to determine whether the decision to terminate was tainted by anti-union animus. No matter how much cause an employer might have to terminate an employee, it is guilty of an unfair labour practice if in addition to cause there was anti-union motivation.

The Board concluded that Ms. Crowley's firing was motivated to some extent by

Le syndicat prétend que l'employeur a commis une pratique déloyale de travail, en violation des articles 8 et 96 ainsi que des alinéas 94(1)a) et 94(3)a) du Code canadien du travail, lorsqu'il a congédié M^{me} Crowley, la plaignante, pour avoir exercé des droits conférés par le Code. Ces droits comprennent tout particulièrement le fait d'appuyer le syndicat et d'inciter ses collègues à faire de même. L'employeur nie cette allégation et soutient que la plaignante a été congédiée pour juste cause.

M^{me} Crowley s'opposait avec véhémence aux changements apportés par l'employeur dans le milieu de travail. De plus, les commentaires qu'elle avait formulés dans une lettre à l'employeur pouvaient être considérés comme de l'insubordination.

Cependant, le Conseil devait décider si la décision de congédier la plaignante était motivée par un sentiment antisyndical. Peu importe si l'employeur avait des motifs valables, il est coupable de pratique déloyale de travail si en plus il a fait preuve de sentiment antisyndical.

Le Conseil conclut que le congédiement de M^{me} Crowley était motivé dans une certaine

management's wish to get rid of a union supporter. Anti-union animus was therefore a proximate cause.

The Board ordered the appropriate remedies pursuant to section 99 of the Code.

mesure par le désir de l'employeur de se débarrasser d'un partisan syndical. Un sentiment antisyndical avait donc contribué directement à la décision.

Le Conseil a ordonné, aux termes de l'article 99 du Code, les mesures de redressement qui s'imposaient.

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LES MOTIFS DE DECISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

United Steelworkers of America, on behalf of
Margaret Crowley,

complainants,

and

Echo Bay Mines Ltd.,

respondent.

Board File: 745-5075
CLRB/CCRT Decision no. 1140
September 28, 1995

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, as well as Ms. Mary Rozenberg and Mr. Calvin B. Davis, Members. A hearing was held on June 20, 21, 22 and 23, 1995, at Edmonton.

Appearances

Messrs. David T. Williams and Gilles Deslauriers, for the complainants; and
Messrs. Tom Wakeling and Fausto Francheschi, for the respondent.

These reasons for decision were written by Mr. Calvin B. Davis, Member.

On May 3, 1995, the United Steelworkers of America filed a complaint with the Board alleging that Echo Bay Mines Ltd. (Echo Bay) had contravened sections 8, 94(1)(a), 94(3)(a) and 96 of the Canada Labour Code (Part I - Industrial Relations) by terminating Margaret Crowley because she had exercised her rights under the Code. Specifically, these rights included her supporting the union and encouraging her co-workers to do the same.

The employer denied the allegation it had terminated Ms. Crowley for union activity and maintained she was terminated for just cause. Subsequent to filing the above

complaint, the union filed two other applications with the Board. These applications dealt with certain activities that allegedly occurred during the union's organizing drive. The parties agreed to a consent order on these two complaints.

Echo Bay operates a gold mine at Lupin, N.W.T. Most of the time, the mine site is only accessible by air; however, there is road access during the winter months when the lakes and rivers are frozen.

The mine employs two nurses. They operate on a two-and-two rotation basis: one nurse works two weeks at the mine site and then the other. Margaret Crowley is one of the nurses. Hired by the employer on May 15, 1989, she has been a registered nurse since 1982. Her job evaluations from her employer have been excellent. During the hearing the employer acknowledged that she is a very good nurse.

According to the employer's witnesses, problems with Ms. Crowley began when she opposed certain changes the employer was instituting. In particular, the employer maintained that Ms. Crowley refused to support Echo Bay's modified work program; as well as the employee and family assistance program; to accept the name change of the nursing station to "health services;" and, to participate in safety meetings. She would not agree to follow certain employer's rules, policies, and procedures which were well known to her. Also she failed to co-operate with her co-workers.

Ms. Crowley's immediate supervisor is Mr. Hugh Ducasse. They were good friends, but the friendship deteriorated as they disagreed on the employer's new policies. They had various discussions over her disagreements with company policy. In fact, Ms. Crowley was so opposed that Mr. Ducasse feared she might quit.

Mr. Ducasse reported his concern with respect to Ms. Crowley's possible resignation to Mr. McCrank, the General Manager. Mr. McCrank did not want Ms. Crowley to leave as she was a good nurse. He met with her in an attempt to explain why the

company was heading in the newly chosen direction. He told her he did not want her to leave as she was a good nurse and was well respected at the job site.

Ms. Crowley still continued to oppose the employer's policy changes. Mr. Ducasse decided to meet with Ms. Crowley to explain what she needed to change in her performance, i.e. her attitude towards management's new policies. During the meeting held on March 25, 1995 in the kitchen conference room, he again went over in detail why the employer had made the changes. Ms. Crowley says she explained her position regarding the changes. As well Ms. Crowley stated that she told Mr. Ducasse a union was necessary. Mr. Ducasse denied the conversation regarding her union beliefs ever took place or the subject of the union ever came up at the meeting.

After the meeting, Mr. Ducasse called Mr. McCrank at his home in Edmonton and let him know that the meeting with Ms. Crowley had been confrontational. He felt Ms. Crowley had made it quite clear she would not support the changes. Mr. Ducasse recommended to Mr. McCrank that she be terminated.

Mr. McCrank felt it would be better if Mr. Ducasse put his concerns in writing and explain the consequences of Ms. Crowley's not accepting the changes. He felt her termination could help the union organization drive. He did not see the letter until he returned to the mine site, but he had it read over the phone to him. On March 26, Mr. Ducasse delivered the letter to Ms. Crowley.

In the letter Mr. Ducasse explained in detail the items discussed at his meeting with Ms. Crowley the day before, outlining areas where he felt improvements in her work performance were required. The final paragraph of his letter read as follows:

"Further refusal to do certain requirements of your job will not be accepted. Failure to comply with these requirements will result in disciplinary action being taken, up to and including termination of employment."

On April 4 Ms. Crowley responded to the above letter. She went into detail explaining her position. Management considered the letter one of insubordination and were particularly upset with certain comments. They took her comments to mean they did not believe she would implement the new programs. After seeing the April 4 letter, the decision was made to terminate Ms. Crowley.

On April 7, the day she was to leave the mine site on her days off, she was presented with a termination letter by Mr. McCrank.

The Board has on numerous occasions reiterated its approach when there is an allegation someone has been terminated for union activity. There is seldom direct evidence showing that an employer's actions are motivated by anti-union animus. Anti-union motives need only be proximate cause for employer action to be found to be a violation of the Code. This policy was summarized by the Board in Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600):

"The law on the subject of discrimination against employees for having exercised rights under the Code is well settled. If a decision by an employer to take any of the actions prescribed in section 184(3)(a) against the employee has been influenced in any way by the fact that the employer's actions will be found to be contrary to the Code. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the Code:

'... It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1) [now 8(1)]. To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to

achieve a discriminatory motive with other non-discriminatory reasons for his act.

For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is contemplated by section 184(1), he will be found to have committed an unfair labour practice.'

(Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82), pages 284-285; and 461)"

(pages 34-35; and 14,007)

There is no doubt that Ms. Crowley was adamantly opposed to the changes brought about in the work place. As well, her letter of April 4, 1995 to the employer can certainly lead to the conclusion that she was not prepared to change her position or co-operate with the employer's changes. Certain comments in the letter could be considered insubordinate.

However, notwithstanding the employer's argument that Ms. Crowley was terminated for just cause, the Board must determine whether the decision was not also tainted by anti-union animus. No matter how much cause an employer might have to terminate an employee, it is guilty of an unfair labour practice if in addition to cause there was any anti-union motivation (see Inuvik Housing Authority et al. (1987), 69 di 212 (CLRB no. 627)).

The employer's witnesses steadfastly claimed they did not know Ms. Crowley supported the union. They claimed the opposite was true and that she had consistently claimed that she was neutral.

The Board concludes that management was aware of Ms. Crowley's union support when it decided to terminate her. Her problems and disagreements with management had gone on for some time. The meeting with Mr. Ducasse on March 25 constituted

another of his attempts to repair the deteriorating relationship with Ms. Crowley and to once more impress upon her the need for her co-operation. Mr. Ducasse never mentioned at this meeting that she was facing discipline or possible termination if she did not co-operate.

At the meeting, he received the same negative responses he had had from Ms. Crowley for months. However, for some inexplicable reason, he deemed her responses, on this occasion, serious enough that he had to call Mr. McCrank who was at home in Edmonton to advise him of the March 25 meeting and recommend termination. In our view this was not because of Maggie Crowley's responses at the meeting, but rather because Mr. Ducasse had come to the conclusion that she was now a union supporter.

Management said they discussed the ramifications of Ms. Crowley's firing on the organizing drive which was taking place at the mine site. Management felt the union could be successful after an individual as popular as Maggie Crowley was fired. However, most often the opposite occurs. The termination of a popular and well-known individual in the middle of an organizing drive can have a telling and chilling effect on an organizing drive. Potential members may well ask themselves "if they can fire the nurse, who is next." (See Inuvik Housing Authority et al., *supra*; Allcap Baggage Services Inc. (1989), 78 di 13 (CLRB no. 744).)

The Board discussed the "chilling effect" a dismissal has on employees in National Bank of Canada (1981), 42 di 352; and [1982] 3 Can LRBR 1 (CLRB no. 335). The panel in that decision quoted from an Ontario decision:

"... the impact of unfair labour practices are seldom confined to an economic impact. For example, the isolated dismissal of an employee in the midst of or at the outset of an organizing campaign is likely to have a significant 'chilling effect' on other employees who witness the incident and understand its origin. The dismissal of

a fellow employee for union activity conveys a strong warning to other employees and can bring a stop to an ongoing drive in its tracks. ..."

(Valdy, Inc., [1980] 3 Can LRBR 299, page 313)

The employer also did not see fit to use its progressive disciplinary procedure of three reprimands before terminating Ms. Crowley. Mr. McCrank felt her subordination was a type II offense warranting instant dismissal. The Board cannot accept this argument. Ms. Crowley had never before been disciplined. Indeed as already stated, the employer had previously encouraged her to stay on. Ms. Crowley's problems at the time of her dismissal were the same as they were months before excepting that now there was a union organizing drive going on. Surely in ordinary circumstances management would have attempted progressive discipline first with such a valued and long-term employee. The Board concludes that the employer never followed its disciplinary procedure because it saw Ms. Crowley as a threat and wished to get rid of her. (See Air Atlantic, supra.)

When management terminated Ms. Crowley they offered her a severance package, although they had no obligation to do so. Before accepting the package, she had to sign a release statement. One of the clauses read as follows:

"I acknowledge that in the course of my employment with Echo Bay Mines Ltd. I have had access to confidential information concerning Echo Bay Mines Ltd. and its employees. I agree not to disclose for any cause or reason to any company, firm, partnership, organization, union, or person confidential information concerning Echo Bay and its employees."

(emphasis added)

This particular clause was different from other employees' release statements which did not contain a clause mentioning disclosure to a "union" in it.

The reason the employer gave for inserting the term "union" in Ms. Crowley's release statement was that there was a union organizing drive at the job site whereas previously there was none.

We do not accept this explanation. The employer maintained that the nurses were part of management. Mr. Ducasse and Ms. Crowley discussed this matter and both agreed that this was so. Mr. Ducasse then advised the other nurse that as she was management she had to remain neutral. To insert the term "union" in Ms. Crowley's release statement leads the Board to conclude that management did so because they knew she was sympathetic to the union.

Based on the foregoing, the Board concludes that Ms. Crowley's firing was motivated, at least in part, by management's wish to get rid of a union supporter. Anti-union animus was therefore a cause. The employer's reasons for the termination are not credible in light of the evidence and the timing of its decision.

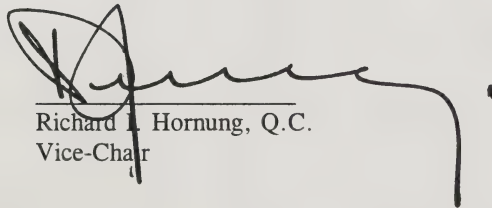
The Board finds that Margaret Crowley was dismissed contrary to sections 8, 94(1)(a), 94(3)(a)(i) and 96 of the Code.

Pursuant to section 99, the Board has the power to remedy the effects of such a violation. Accordingly, the Board orders the employer to:

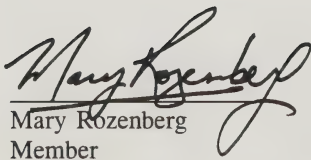
- (1) comply with and cease contravening the Code;
- (2) reinstate Ms. Crowley at the next shift change to which she would be normally returning to the job site;
- (3) pay to Ms. Crowley forthwith compensation for lost wages and benefits equivalent to that which she would have earned between the date of her dismissal and the date of reinstatement;

- (4) send a copy of this decision by mail to each employee and member of management within ten days of receiving this decision (the employer will submit proof to the Board's labour relations officer that it has done so); and
- (5) post on all bulletin boards at the job site a copy of this decision within five days of receiving this decision.

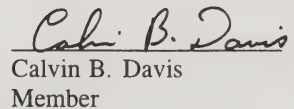
The Board appoints Mr. Ron O'Hara, Senior Labour Relations Officer in Vancouver, to assist the parties to implement the foregoing orders. The Board shall remain seized of the matter in order to determine any question that may arise with respect to the foregoing orders and to issue a formal order if such be required.



Richard L. Hornung, Q.C.
Vice-Chair



Mary Rozenberg
Member



Calvin B. Davis
Member

information

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Summary

International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514, *applicant*, Saskatchewan Wheat Pool, *employer*, and Grain Workers Union, Local 333, CLC, *intervenor*.

Board File: 555-3817

Grain Workers Union, Local 333, CLC, *applicant*, Saskatchewan Wheat Pool, *employer*, and International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514, *intervenor*.

Board File: 555-3820

CLRB/CCRT Decision no. 1141
September 14, 1995

In 1977, the Board designated the British Columbia Terminal Elevator Operators' Association (BCTEOA) as the representative employer association, pursuant to section 33(1) of the Code, for the purposes of bargaining with a unit of operational employees of the five member companies of the BCTEOA.

The applicant unions now apply for a unit of foremen employed by the Saskatchewan Wheat Pool, a single member employer of the BCTEOA.

Résumé

Syndicat international des débardeurs et magasiniers, contremaîtres de navire et de quai, section locale 514, *requérant*, Saskatchewan Wheat Pool, *employeur*, et Grain Workers Union, section locale 333, CTC, *intervenante*.

Dossier du Conseil: 555-3817

Grain Workers Union, section locale 333, CTC, *requérante*, Saskatchewan Wheat Pool, *employeur*, et Syndicat international des débardeurs et magasiniers, contremaîtres de navire et de quai, section locale 514, *intervenant*.

Dossier du Conseil: 555-3820

CLRB/CCRT Décision n° 1141
le 14 septembre 1995

En 1977, le Conseil a désigné, en vertu du paragraphe 33(1) du Code, la British Columbia Terminal Elevator Operators' Association (BCTEOA) comme organisation patronale représentante pour négocier avec une unité d'employés de l'exploitation des cinq compagnies membres de la BCTEOA.

Les syndicats requérants demandent par la présente à être accrédités à l'égard d'une unité de contremaîtres chez Saskatchewan Wheat Pool, un employeur membre de la BCTEOA.

The Board was required to interpret section 33(1) of the Code in order to determine whether the special regime, brought into play by section 33, applies only to those employees included in the original certification order granted in 1977 (i.e., the operational employees) or rather establishes the scope of the bargaining structure for all the employees of the member employers of the BCTEOA.

A majority of the Board determined that the unions have not applied to be certified for the proper employer.

A designation by the Board, pursuant to section 33, has the effect of defining the bargaining unit structure for all of the employees of the member employers who fall within the unit configuration. While the Board's section 33 designation remains in effect, all employees of the five member companies represented by the BCTEOA have the same employer for the purposes of collective bargaining under Part I of the Code and the acquisition of bargaining rights under Part I, Division III.

Accordingly, the Board dismisses both applications for certification.

The dissenting Board Member Davis would have ruled that the Board lacks jurisdiction to determine that the multi-employer association is the proper employer for certification under section 24 of the Code.

Le Conseil doit donner son interprétation du paragraphe 33(1) du Code afin de déterminer si le régime particulier, établi en vertu de l'article 33, s'applique seulement aux employés inclus dans l'ordonnance d'accréditation initiale rendue en 1977 (c.-à-d. les employés de l'exploitation) ou s'il établit plutôt que la portée de la structure de négociation englobe tous les employés des employeurs membres de la BCTEOA.

La majorité du Conseil décide que les syndicats requérants n'ont pas logé leurs demandes d'accréditation envers le bon employeur.

Une désignation faite en vertu de l'article 33 définit la structure d'unité de négociation pour tous les employés des employeurs membres qui sont visés par la configuration de l'unité. Aussi longtemps que la désignation qui a été faite par le Conseil en vertu de l'article 33 reste en vigueur, les employés des cinq compagnies membres représentées par la BCTEOA ont le même employeur aux fins de la négociation collective aux termes de la Partie I du Code et aux fins d'acquisition des droits de négociation aux termes de la Partie I, Division III.

En conséquence, le Conseil rejette les deux demandes d'accréditation.

Le membre dissident Davis aurait traité les demandes d'accréditation puisqu'il est d'avis que le Conseil n'a pas compétence pour déterminer que l'association multi-patronale est le bon employeur pour les fins de l'accréditation en vertu de l'article 24 du Code.

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Reasons for decision

International Longshoremen's and
Warehousemen's Union, Ship and Dock
Foremen, Local 514,

applicant,

Saskatchewan Wheat Pool,

employer,

and

Grain Workers Union, Local 333, CLC,

intervener,

Board File: 555-3817

Grain Workers Union, Local 333, CLC,

applicant,

Saskatchewan Wheat Pool,

employer,

and

International Longshoremen's and
Warehousemen's Union, Ship and Dock
Foremen, Local 514,

intervener.

Board File: 555-3820

CLRB/CCRT Decision no. 1141
September 14, 1995

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Messrs. Calvin B. Davis and François Bastien, Members.

The reasons for this majority decision were written by Vice-Chair Richard I. Hornung, Q.C.

Member Calvin B. Davis dissents.

Appearances:

Mr. Bruce A. Laughton for the International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514;

Mr. John A. Hodgins for the Grain Workers Union, Local 333, CLC;

Mr. R. Alan Francis for Saskatchewan Wheat Pool; and

Mr. Eric J. Harris for the B.C. Terminal Elevator Operators' Association.

I

These reasons for decision deal with two competing applications for certification filed pursuant to section 24 of the Code by:

- (1) the International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 (ILWU) (Board file 555-3817) to represent:
"all employees employed by Saskatchewan Wheat Pool working at the North Vancouver Elevator known as Supervisors, Operations Foremen, Maintenance Foremen, Mechanical Foremen, Purchasing Agents, Electrical Foremen, Grain Processing Supervisors, Sheet Metal Foremen, Foremen, Computer Analyst, Quality Control, and all other related duties"
and,
- (2) the Grain Workers Union, Local 333, CLC, (GWU) (Board file 555-3820) to represent:

"all foremen, supervisors and comparable employees employed by Saskatchewan Wheat Pool working at the North Vancouver Elevator including those identified as Operations Foremen, Maintenance Foremen, Mechanical Foremen, Purchasing Agents, Electrical Foremen, Grain Processing Supervisor, Sheet Metal Foremen, Computer Analyst, Quality Control and, all other related positions"

II

The operational employees, working at Saskatchewan Wheat Pool, are presently represented by the Grain Workers Union, Local 333, CLC, (GWU). In certifying the GWU (see Saskatchewan Wheat Pool (1977), 21 di 388; [1977] 1 Can LRBR 510; and 77 CLLC 16,014 (CLRB no.83)), the Board designated the B.C. Terminal Elevator Operators' Association (BCTEOA or the Association) to be the employer, pursuant to section 33(1) of the Code, for a unit comprising the operational employees of the five member companies of the Association which included Saskatchewan Wheat Pool.

In 1977 the five member companies of the Association were:

Alberta Wheat Pool
Pioneer Grain Terminal Ltd.
Saskatchewan Wheat Pool
United Grain Growers Limited
Pacific Elevators Limited

The certificate issued by the Board in 1977 does not include the foremen, and describes the unit as follows:

"all operational employees employed by the five member companies of the B.C. Terminal Elevator Operators' Association in their terminal grain elevator operations in the Vancouver and North Vancouver Area, excluding office employees, maintenance engineer, foremen and persons above the rank of foreman".

Since the above multi-employer designation was granted, Prince Rupert Grain joined the Association as a member. However, it is not formally covered by the bargaining certificate insofar as the GWU has never requested the Board, pursuant to section 33 of the Code, to extend the scope of the said certificate to include the employees at Prince Rupert Grain (see Grain Workers Union, Local 333 v. BCTEOA and Prince Rupert Grain Ltd. (1989), 101 N.R. 105 (F.C.A.) which overturned Prince Rupert Grain Ltd. (1988), 75 di 13 (CLRB no. 706)).

In its decision of 1977, the Board expressed the employer designation as follows:

"In conclusion, the Board ...

(2) grants certification to Local 333 for a unit consisting of all operational employees of the five employers involved for which it was previously certified; and

(3) designates the B.C. Terminal Elevator Operators' Association to be the employer for the purposes of the certification granted to Local 333."

(Saskatchewan Wheat Pool, *supra*, at pages 409 and 526; emphasis added; see also Prince Rupert Grain Ltd. (1994), 93 di 164 at page 166 (CLRB no. 1050), where the Board retained similar wording in describing the factual background in that case)

In another decision, reversed by the Federal Court of Appeal on specific grounds of jurisdiction, the Board, in describing the factual context, appears to view that designation as applicable for all purposes of the Code:

"In 1977, the Association was designated as the employer for the purposes of the Code."

(Prince Rupert Grain Ltd. (1988), 75 di 13, page 15; overturned by the F.C.A. (1989), 101 N.R. 105)

This apparent ambiguity, as well as the Federal Court of Appeal's decision in ILWU, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd. et al. (1994), 94 CLLC 14,042, 174 N.R. 255 (leave to appeal to the Supreme Court of Canada granted on March 30, 1995), induced the unions to bring the instant applications for certification of a unit of foremen of only one member employer of the BCTEOA.

III

Saskatchewan Wheat Pool (SWP) and BCTEOA join in their opposition to both applications, essentially invoking the following three alternative submissions:

- (1) the foremen are not "employees" within the meaning of the Code;
- (2) the bargaining unit applied for is not appropriate: if certified at all, the foremen should be included in the existing unit of operational employees; and,
- (3) both unions have applied for a unit of employees of the wrong employer since the designated employer of all employees working at Saskatchewan Wheat Pool is the BCTEOA as designated by the Board in its 1977 order.

IV

In our view the first two alternative objections are not well founded and can be dealt with together.

Persons exercising supervisory duties, who do not perform management functions, are "employees" within the meaning of the Code and may therefore be represented by a trade union for collective bargaining purposes. Such is the case with the foremen in the instant application. However, it has been the Board's practice to separate these supervisory employees from those they supervise in order to avoid possible conflicts of interest. (See Canada Ports Corporation (1993), 92 di 211; 21 CLRBR (2d) 281; and 94 CLLC 16,003 (CLRB no. 1031); Island Telephone Company Limited (1990), 81 di 126 (CLRB no. 811); and Canadian Broadcasting Corporation (1984), 55 di 197 at page 226 (CLRB no. 461)).

Were the Board to conclude that the union has applied to be certified for the foremen of the right employer, there would be no reason to depart from this practice in the present circumstances.

V

The remaining issue to be determined is whether the unit applied for by the applicants, pursuant to section 24, is appropriate for certification. Fundamental to the determination of the appropriate unit is a decision as to who the employer of the employees applied for is. In the present case, in order to make that determination, it is necessary to interpret the effect of the Board's original certification order granted to the GWU, pursuant to section 33, in 1977.

Reduced to its essence, the union's argument in this regard is that the Board cannot refuse to certify a union in the present application on the basis that the BCTEOA was designated as the employer under section 33. They argue that a designation, pursuant to section 33, is restricted exclusively to those employees at whom it is directed and solely to the union making the application; and that it cannot be taken to define the bargaining unit structure for the unrepresented employees. Their argument presupposes that, for the purposes of the present application, the foremen do not have

the same employer for the purposes of the Code as the operational employees who they supervise. Finally, they cite Prince Rupert Grain, *supra*, in support and argue that the Board cannot consider section 33 unless it is brought into play by direct union application.

The respondents argue that if the unions' position is accepted the Board's discretion under section 24 would be emasculated in the current circumstances. Regardless of an earlier designation pursuant to section 33, the Board would be compelled to certify any union applying for a lesser unit of employees belonging to a single member employer who was part of the multi-employer designation. They say that a designation under section 33 changes the labour relations reality for all of the players involved. To accept the argument of the unions would ignore the reality of the existing unit and bargaining structure.

Although it is necessary to interpret the effect of a section 33 order, it must be made clear that the Board does not regard the present application as being one brought pursuant to section 33. The Federal Court of Appeal has made it abundantly clear that before the Board can apply section 33 it must be invoked by the union applying for the certification order: International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd. et al., *supra*:

"... These definitions suggest that, except where section 33 applies, the Board's power is limited in the first instance to determining the appropriate unit of employees of a particular employer. It is otherwise where an applicant invokes section 33 in which event the Board may exercise the additional power therein conferred. Whatever may be said about the desirability of imposing the unit that the Board deemed to be appropriate, such a unit could not be imposed without the consent of the applicant. A power to so act without the applicant's consent would have to be expressly conferred by Parliament. A pragmatic and functional approach to the Board's jurisdiction surely does not mean that a reviewing court must ignore a clear statutory limit on the Board's jurisdiction."

(pages 264; and 12,262; emphasis added)

Neither union here has applied pursuant to section 33. The only reason that it is necessary to interpret the effect of the Board's 1977 section 33 designation is in order to determine who the "particular employer" is for the purposes of the present section 24 application.

In our view, the words of the Federal Court of Appeal in Prince Rupert Grain, *supra*, cannot be taken as a blanket prohibition against our including in our deliberations - in an application under section 24 - the effect of a previous Board Order. Bearing in mind the Board's responsibilities, we simply cannot decide the present applications under section 24 as if the Board's earlier designation under section 33 did not exist.

The focus of our enquiry then is whether the Board's multi-employer designation in 1977, pursuant to section 33 of the Code, for a unit of operational employees, is limited to the singular employees and the singular purpose of the specific certification granted at the time, or rather has the effect of clothing the BCTEOA with the requisite authority as "employer" for all its members' employees for all purposes of the Code - including any subsequent applications for certification.

VI

The relevant sections of the Code read as follows:

"24. (1) A trade union seeking to be certified as the bargaining agent for a unit that the trade union considers constitutes a unit appropriate for collective bargaining may, subject to this section and any regulations made by the Board under paragraph 15(e), apply to the Board for certification as the bargaining agent for the unit.

...

27.(1) *Where a trade union applies under section 24 for certification as the bargaining agent for a unit that the trade union considers appropriate for collective bargaining, the Board shall determine the unit that, in the opinion of the Board, is appropriate for collective bargaining.*

(2) *In determining whether a unit constitutes a unit that is appropriate for collective bargaining, the Board may include any employees in or exclude any employees from the unit proposed by the trade union.*

...

28. *Where the Board*

(a) *has received from a trade union an application for certification as the bargaining agent for a unit,*

(b) *has determined the unit that constitutes a unit appropriate for collective bargaining, and*

(c) *is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent,*

the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit.

...

33.(1) *Where a trade union applies for certification as the bargaining agent for a unit comprised of employees of two or more employers who have formed an employers' organization, the Board may designate the employers' organization to be the employer if it is satisfied that each of the employers forming the employers' organization has granted appropriate authority to the employers' organization to enable it to discharge the duties and responsibilities of an employer under this Part.*

(2) Where the Board designates an employers' organization as an employer pursuant to subsection (1),

(a) the employers' organization and each employer forming the employers' organization is bound by any collective agreement entered into by the employers' organization and the trade union concerned; and

(b) this Part applies, except as otherwise provided, as if the employers' organization were an employer."

(emphasis added)

VII

It is a well-known interpretative rule that, faced with an ambiguity in the legislation, a tribunal must interpret the statute in a manner consistent with the public object of the legislation.

"The general principles, as we have seen, are that if the words are clear and unambiguous they must be followed; but if they are not, then a meaning must be chosen or found. But the Act must be read as a whole first, for only then can it be said that the words are or are not clear and unambiguous. As Viscount Simonds said in the Prince Augustus case:

'It must often be difficult to say that any terms are clear and unambiguous until they have been read in their context. That is not to say that the warning is to be disregarded against creating or imagining an ambiguity.... It means only that the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he has read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous.'"

(Driedger, E.A., Construction of Statutes; 2nd Edition: page 88)

As explained by the Supreme Court of Canada:

"...in every case the meaning of the statutory provision must be obtained by consideration not only of the actual words in a subsection but of the whole statute and by considering the purpose of the legislation."

(Toronto Transit Commission v. City of Toronto [1971] S.C.R. 746, page 752)

In R.W.D.S.U. v. Canadian Linen Supply, [1991] 8 CLRBR (2d) 228, the Saskatchewan Labour Relations Board provided similar statutory interpretation guidelines for choosing an appropriate and reasonable meaning in the context of a labour relations statute:

"The provisions of The Trade Union Act must be interpreted in such a fashion that the interpretation coincides with the scheme and object of the Act and the intention of the Legislature, as directed by Mr. Justice Cameron in United Association of Journeymen and Apprentices, Local 264 v. Metal Fabricating and Construction Ltd., March 1990, Sask. Court of Appeal File No. 83 (unreported), where he states at p. 28:

'According to this approach the true meaning of an enactment is to be derived by reading the words thereof in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the Act and the intention of the legislator: Driedger, Construction of Statutes (2nd ed.) p. 87. Within this general framework there exist numerous specific aids to discovering legislative intention. But, for the most part, they are only aids, and however useful, they must be applied with a view to attaining the objects of the statute and its enacting provisions. Indeed the objects or purposes of an Act and its parts are frequently seen as the deepest source of assistance in uncovering uncertain intention.'"

(pages 233-34)

The meaning and intent of section 33 must therefore be determined by reading its words in the entire context of the Canada Labour Code harmoniously with the scheme and objects of the Code.

The purposes of the Canada Labour Code and the scheme and objects of the Act, are, inter alia, as set forth in the Preamble contained in Part I. Paragraphs 2 and 4 read as follows:

" ...

And whereas Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;

...

And whereas the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all;"

...

(emphasis added)

VIII

There can be no disputing the premise that bargaining unit structures influence the process and outcome of collective bargaining. For that reason, among others, the statutory process of certification provides the Board with exclusive authority to fix the contours of an appropriate bargaining unit structure in order to facilitate effective collective bargaining and promote industrial stability.

The purpose of sections 32 to 35 of the Code is to provide for the establishment of "special" bargaining regimes and structures that will confer collective bargaining rights to the unions or employers within such units, and in such circumstances, deemed appropriate by the Board. Like sections 32, 34 and 35, section 33 was designed to allow for the creation of distinctive unit structures facilitating broad-based collective bargaining and the consequent promotion of industrial peace and labour relations stability that ensues therefrom.

Section 33 essentially provides for a system of multi-employer certification. It permits an employers' association, within a unit deemed appropriate by the Board, to acquire exclusive bargaining rights "...for a unit comprised of employees of two or more employers who have formed an employers association...".

The purpose of designating an employers' organization, pursuant to section 33, to be the "employer" within the appropriate unit, is to institute, at the request of the union, a collective bargaining regime with a single employer representative on one side of the bargaining table and one bargaining agent representing employees of the employer's members on the other. That this centralization of the collective bargaining promotes "...sound labour-management relations" and reflects a "...constructive collective bargaining practice.." is self evident.

Can these purposes be achieved if the Board's designation, pursuant to section 33, applies only to part of the employees working for the "employer"? We think not. The limited scope of the employer designation - and its impact on subsequent section 24 applications - as proposed by the unions, creates serious problems, from a labour relations perspective, with regard to the operation of the unit structure deemed appropriate by the Board in 1977. It calls into question some of the fundamental criteria which the Board considered when it designated the appropriate unit, including the ability of the proposed unit of employees to carry on a viable collective bargaining relationship with the single member employer as opposed to the employer designated pursuant to section 33, the community of interest shared by the employees in the unit

proposed and the promotion of industrial stability. In addition to the problems posed for the bargaining unit at large, the unions' interpretation would fundamentally undermine the Board designated employer association's ability to carry out its collective bargaining responsibilities within that special regime.

In the present case it would mean that representatives of the supervisory employees, who work side by side with the operational employees, would not have the same employer negotiating at the bargaining table. Nor would they share a similar unit configuration or labour-management relations structure with either those operational employees whom they supervise, or, more importantly, the other supervisory employees with whom they share common working conditions and an obvious community of interest.

It is difficult to imagine how the purposes of the Code generally, and of section 33 specifically, could be achieved in the instant case by limiting the scope of the employer designation as suggested by the applicants, so as to permit the possible fractionation of the current bargaining structure for operational employees into five separate units for supervisory employees. The result would be that, on the one hand, there would be one unit, with one certified bargaining agent, for all operational employees on the docks who would collectively bargain with one employer as designated by the Board while, on the other hand, there could be up to five separate unions bargaining with five separate employers on behalf of the supervisory employees who, although fractionated into five separate units, would nevertheless exercise supervisory authority within a single operational employee unit. All of which would occur in the same geographic location.

As indicated, the unions' interpretation presupposes that the foremen do not have the same employer for the purposes of the operation of the Code as do the operational employees that they supervise. To illustrate but one problem with that interpretation one need but consider the "Gordian knot" which would be created if either of the present applications were allowed and the GWU subsequently applied to the Board for

an order that an employee who was previously included in the "Foreman's unit" no longer carries out supervisory duties and should be included in the unit of operational employees. Who would the GWU serve with the applicable documents? Who would the employer be for the purpose of the application? Would it be the BCTEOA or Saskatchewan Wheat Pool? Would there then be two potential employers of the same employee for the purposes of a single application under the Code?

The interpretation suggested by the unions would undermine the purposes, intended by the Code, of establishing the special bargaining regimes which sections 32 to 35 were designed to serve, and would have the opposite effect of promoting the industrial peace and labour relations stability which the Code is designed to achieve.

IX

The Board's focus, in an application for certification pursuant to section 33, is firstly on whether the union has made the necessary application. Thereafter, it concentrates its attention on whether or not the employers' organization has the requisite authority to act as the "employer" for the purposes of the Code within that unit and, finally, on the appropriateness of the proposed bargaining unit.

Section 33 provides that the "...Board **may** designate the employers' organization to be the employer". This permissive language gives the Board the **discretion** to grant an application if "...it is satisfied that each of the employers forming the employers' organization has granted appropriate authority to the employers' organization to enable it to discharge the duties and responsibilities of an employer..." under Part I of the Code.

Accordingly, before exercising its discretion and granting an order under section 33, the Board must closely examine the nature of the support available to the designated

employer to ensure that it is serious and stable in order that the purposes of the Code are served by the broad-based unit created when the Board's order issues (Saskatchewan Wheat Pool, supra, at pages 407-408).

If the present applications were allowed, each member employer would be required to bargain individually for separate units with its supervisors while, at the same time, sitting as a constituent member of the larger Employers' Association to bargain with its operational employees. Circumstances would inevitably arise where the bargaining interests of the member employer would conflict at one or the other bargaining tables. If the bargaining interests of member employers at their individual tables were to conflict to a sufficient degree with the interests of the Association at the larger table, it would surely jeopardize both support for the Association itself as well as the appropriate unit for which the Association is designated. Faced with having to bargain in two different units, a member employer could simply opt out of the Association in order to bargain its own interests with both the operational employees and foremen on a similar unit structure. The unions' interpretation would therefore undermine the collective bargaining process and would open the appropriate unit designated by the Board pursuant to section 33 to systemic instability and fragmentation.

The practical effect would be that the critical "appropriate authority" granted by the member employers to the employers' organization under section 33(1), to carry out its responsibilities as an employer under Part I of the Code, would be seriously eroded, if not illusory. The Board's employer designation for the broad-based bargaining structure, which section 33 envisions, could not withstand selective certification applications which would fractionate the unit structure on a member-employer by member-employer basis.

Bearing in mind the objectives of section 33 of the Code, it is simply inconceivable that the Board would exercise its discretion to grant an order under section 33 when, irrespective of the Board's enquiry and designation, any union could fractionate the

bargaining unit structure put into place by the Board, by simply applying for certification on a member-employer by member-employer basis for employees of the workplace not covered by the original certificate. In the present case this scenario is even more graphic in that, if the unions' interpretation were accepted, the GWU itself could effectively fractionate the very unit structure for which it applied, and received, an employer designation in 1977. From a practical labour relations perspective, why would the Board exercise its discretion to establish a unit, which it deems appropriate for collective bargaining, when the geographical and structural configuration of that unit would not be durable and would only apply to a segment of employees working within it?

To allow such applications would erode the Board's role in the exercise of its discretion both with respect to the designation of the employers' organization and the determination of the appropriate unit. In short, the consequences of the applicants' interpretation of section 33, with regard to the identity of the employer for the purposes of the present section 24 application, are untenable. They exhibit an anomalous interpretation that conflicts both with the objects and purposes of section 33 itself and the general purposes of Part I of the Canada Labour Code.

X

Once the Board has "...designate[d] the employers' organization to be the employer..." pursuant to section 33(1) of the Code, and a certification order pursuant to section 28 issues, the "employer" so designated is clothed with all the requisite authority and responsibility which befalls it as a consequence of that order. Without further Board order or direction, and without the application of section 33(2)(b), the employer is required to bargain collectively with the representative union (section 48 and section 50) and is subject to all the provisions of Part I of the Code as a consequence of the certification order. Equally, the union acquires the rights and obligations as the bargaining agent pursuant to section 36.

Therefore, once the Board has determined that the provisions of sections 33(1) and 28 are met, and a certification order issues, there is no need to further declare that the "employer" shall be subject to the provisions of Part I of the Code for the purposes of that specific certification. That consequence flows from the determination by the Board that the employer falls within the definition of "employer" contained in the Code and the Board's order pursuant to section 28. Further, with respect to all unfair labour practice complaints, and unlawful strikes or lockouts, an employers' organization is automatically an "employer" by virtue of the definition contained in section 88 of the Code. There is therefore no need, within section 33(2)(b), to further define the obligations of the employer for the purposes of the appropriate unit for which the certification order issued.

Section 33(2)(b) must therefore have a purpose other than a tautological declaration of the consequences of certification (similar logic applies to the combined effect of section 33(2)(a) and section 56 of the Code).

"It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. In Hill v. William Hill (Park Lane) Ltd., Viscount Simon said:

'Although a Parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is a good reason to the contrary, the words add something which would not be there if the words were left out.'

As Lord Simon indicates, every word and provision found in a statute is supposed to have a meaning and a function. For this reason courts

should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant."

(Dreidger on the Construction of Statutes, 1994, 3rd Edition, at pages 159-160)

Section 33(2) stipulates that where the Board designates an employers' organization as an employer under subsection (1), Part I of the Code applies "...as if the employers' organization were an employer". Section 33(2) therefore can only have meaning and purpose if it refers to the fact that the employer designated, pursuant to section 33(1), becomes the "employer" of all its members' employees for all purposes under Part I of the Code. To give meaning to section 33(2)(b), a designated "employer" must discharge its duties for all employees of its member employers and not only for those to whom the certification is directed. To conclude otherwise would make it redundant.

Section 33(2)(b), therefore, can only have meaning and purpose if it articulates that the employer's obligations, qua employer, extend beyond the confines of the specific application made by the union for which the Board's designation pursuant to section 33(1) issued.

XI

In 1977, when the Board certified the GWU to represent the operational employees of the five member companies, it could have included the foremen in the same unit if it had found it appropriate to do so (see section 27(2)); it could also have dismissed an application for certification of the foremen of only one member employer, had one been filed at the same time.

The Board was not bound by the particular description of the unit proposed by the applicant union at that stage. Although section 33 requires an application by a union for "...certification as the bargaining agent for a unit comprised of employees of two or more employers...", the final determination of the appropriate unit, for which the Board's multi-employer designation issues, remains solely with the Board and, with the exception of the constituent employers, is otherwise not restricted to the unit configuration applied for by the union. Consistent with its policy considerations in certification applications generally, it may choose to add or remove some employees of the designated employer from the proposed unit.

The Board chose not to include the foremen in the same bargaining unit as the operational employees in 1977. However, this exclusion does not mean that the foremen do not fall within the structural or geographical parameters covered by the special bargaining regime established by the Board's designation pursuant to section 33. At best, it only demonstrates that the foremen did not share a sufficient community of interest with the operational employees for the Board to include them in the certification order.

The issue at the time the Board granted its designation in 1977 - after the preliminary criteria in section 33(1) had been met - was one of appropriateness of a multi-employer bargaining unit and the appropriate structure of the same. The structural and geographic configuration of the bargaining unit, which results from the Board's designation pursuant to section 33, remains even though certain employees may be excluded, for a variety of reasons, from the unit so certified.

Accordingly, once the structure is put into place, and the employer designation is made by the Board under section 33(1) of the Code, the issue to be determined in subsequent section 24 applications, as in the present one, is whether the union has applied to be certified for the proper employer and secondly, if the proposed unit applied for constitutes an appropriate unit of employees of that particular employer.

This determination does not have the effect of extending the multi-employer bargaining unit regime; that regime is already in place and encompasses all the employees at the workplace of the "section 33 employer" designated by the Board.

The regime established by the Board in 1977 encompasses all employees of the five member employers for which an employer designation was issued. The employer for all purposes of the Code, unless its authority is withdrawn, is the BCTEOA. Accordingly, the unions have not applied to be certified for the proper employer.

The instant case is, in our view, distinguishable from Prince Rupert Grain Ltd. (1989), supra, and Prince Rupert Grain Ltd. (1994) supra. In those cases, the Board included the six members of the BCTEOA in the bargaining unit structure. This included Prince Rupert Grain which had become a member subsequent to the original designation in 1977. However, the GWU had never applied, pursuant to section 33, to include the employees of Prince Rupert Grain in the 1977 original certificate. The Court held that, notwithstanding the de facto relationship between the parties, the Board could not impose a multi-employer unit except upon application by the union pursuant to section 33 of the Code.

The appropriate unit structure for the multi-employer unit in question in this application was established when the Board made the original section 33(1) designation in 1977. Accordingly, when dealing with a subsequent application for review (section 18) or for certification (section 24), the Board may refuse to remove from or add employees to the bargaining unit description; or it may dismiss an application for certification if circumstances are such that it would have been permitted to do so at the time of the original certification. The Federal Court of Appeal explained this notion as follows in 1989:

"The Board could amend that order [1977 certification] under s. 119 [now s. 18] only if the circumstances were such that, had they existed in 1977, the Board would have then been authorized by s. 131 [now s. 33] to render the amended decision."

(Prince Rupert Grain Ltd., (1989) supra, page 107)

Here the employer is identified to be the BCTEOA. At the hearing of this matter it was not disputed that the Saskatchewan Wheat Pool, and each of the remaining four member employers forming the BCTEOA, belong to that organization and have granted the appropriate authority to it to enable the BCTEOA to discharge its duties and responsibilities as an employer and to bargain collectively on behalf of all the member employers BCTEOA. The evidence therefore establishes that the member complement of the designated employer for our purposes remains the original five employers of the BCTEOA as designated in 1977; and that those employer members continue to empower the BCTEOA to, in the words of the Code, "...enable it to discharge the duties and responsibilities of an employer...". The employer structure recognized and designated by the Board in 1977 therefore remains intact. In keeping with the Federal Court of Appeal's direction in its 1989 decision in Prince Rupert Grain, supra, the determination before us now is within our jurisdiction, in that the Board could have refused, in 1977, to certify a unit such as the one that the unions are now proposing if a certification application had been presented at the time. Our determination here does not alter or interfere with the original unit configuration proposed by the union in 1977 for which the employer designation was granted. Nor does it **impose** a multi-employer unit. That unit was designated by the Board in 1977, and must now be considered in addressing the present section 24 application.

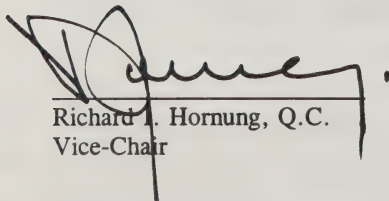
As suggested by the Federal Court of Appeal, in referring to the original designation in 1977, failure to apply for a unit comprised of the employees of all the member employers of an employers' organization may constitute a valid ground to dismiss the present applications:

"Moreover, a mere reading of s. 33 makes it clear that what that section contemplates and authorizes is the certification of a union, at its request, as the bargaining agent for a unit comprised of the employees of all the employers who have formed an employers' organization. If, therefore, the applicant had applied to the Board in 1977 to be certified as the bargaining agent of only five of the six members of an employers' organization, its application might perhaps have been dismissed on the ground that it did not include all the members of the organization but the Board would not have had the power, without the consent of the applicant, to include in the bargaining unit the employees of the sixth member."

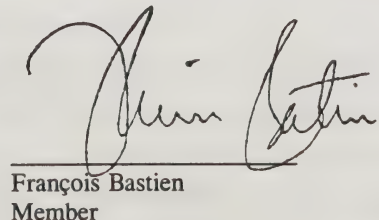
(Grain Workers Union, Local 333 v. Prince Rupert Grain Ltd. (1989), 101 N.R. 105, page 107; emphasis added)

The employees affected by this application - and all employees of the 5 member companies - have the same employer, namely the BCTEOA, for the purposes of collective bargaining under Part I, as well as the acquisition of bargaining rights under Part I, Division III, of the Code. They may be represented by a different bargaining agent, which is no different from any other business where different bargaining agents represent different groups of employees, but under the special regime of section 33, they have the same employer for the administration of Part I of the Code.

For all the above reasons, the Board concludes that both applications for certification must be dismissed in that the unions have not applied to be certified for a unit of employees of the proper employer.



Richard I. Hornung, Q.C.
Vice-Chair



François Bastien
Member

Dissent follows.

DISSENT OF MEMBER CALVIN B. DAVIS

I have read the decision of my colleagues and am in disagreement. The majority's reasoning is that because of the Board's designation in 1977, all employees of the five member-companies have the same employer for the purpose of collective bargaining under Part I of the Code.

If this were the case then the Court's comments in Grain Workers Union v. British Columbia Terminal Elevator Operators' Association et al. (1989), 101 N.R. 105, (F.C.A.) would, I believe, be made inapplicable.

"The multi-employer bargaining structure created by s. 33 is purely voluntary. It is voluntary for the employees who cannot be compelled either to join or to remain in an employers' organization; it is also voluntary for the union since no order can be made under s. 33 unless the union has applied for it. Moreover, a mere reading of s. 33 makes it clear that what that section contemplates and authorizes is the certification of a union, as its request, as the bargaining agent for a unit comprised of the employees of all the employers who have formed an employers' organization. ..."

(page 107; emphasis added)

On page 7 of the majority decision, the following is written:

"Although it is necessary to interpret the effect of a section 33 order, it must be made clear that the Board does not regard the present application as being one brought pursuant to section 33."

What the majority is saying as I understand it is that the B.C. Terminal Elevator Operators' Association is now the employer for the purposes of section 24 of the Code. This is incorrect. The only way it can become an employer in these particular

certification applications is if the trade union applied for certification under section 33 of the Code. Section 24 cannot now be used to circumvent section 33 of the Code.

The clear effect of the majority decision is that the applicant can never hope to obtain certification for the affected employees of Saskatchewan Wheat Pool unless it agrees to include them in a multi-employer unit with the British Columbia Terminal Elevator Operators' Association as the designated employer.

In International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd. (1994), 174 N.R. 255; and 94 CLLC 14,042 (F.C.A.), Stone, J., speaking for majority, said the following:

"... It is not necessary to repeat what I have already quoted from the decision of the Court in Grain Workers' Union Local 333, supra. That decision is binding on us. No reason has been suggested for not applying it here. It decided that the Board may not impose a multi-employer unit pursuant to section 33 of the Code unless the union concerned has agreed that it should do so. To the extent that the Board's decision hinges on that section of the Code, I am bound to conclude that it was beyond the limits of its jurisdiction because that section was not invoked by the applicant and, accordingly, the applicant did not consent to the Board's determination of the appropriate unit under that section. ..."

(pages 264; and 12,262; emphasis added)

Although the majority's reasoning may be sound from a labour relations perspective, I believe the Board only has jurisdiction to find a multi-employer organization is the employer in a certification application when the applicant trade union asks to be certified for a unit comprising employees of two or more employers, or as the learned Court said: "unless the union concerned has agreed that it should do so." Section 24 cannot be used to get around the primary aspect of section 33 which is the union concerned must apply before a multi-employer association can be certified.

No doubt there is an ambiguity in the legislation which might well create all sorts of labour relations problems. These problems and the solution were addressed by Justice Stone in his majority reasons in International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd., supra:

"... These definitions suggest that, except where section 33 applies, the Board's power is limited in the first instance to determining the appropriate unit of employees of a particular employer. It is otherwise where an applicant invokes section 33 in which event the Board may exercise the additional power therein conferred. Whatever may be said about the desirability of imposing the unit that the Board deemed to be appropriate, such a unit could not be imposed without the consent of the applicant. A power to so act without the applicant's consent would have to be expressly conferred by Parliament. A pragmatic and functional approach to the Board's jurisdiction surely does not mean that a reviewing court must ignore a clear statutory limit on the Board's jurisdiction."

(pages 264; and 12,262; emphasis added)

In conclusion I believe the Board lacks jurisdiction to determine that the multi-employer association is the proper employer. I would rule on the certification proceedings pursuant to section 24 of the Code with the Saskatchewan Wheat Pool as the employer.



Calvin B. Davis
Member of the Board

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Summary

Syndicat des débardeurs de Trois-Rivières, Local 1375 (CUPE), *applicant*, and Maritime Employer's Association and Équipements Bellemare Ltée, *respondents*.

Board File: 610-130
CCRT/CLRB Decision no. 1142
October 13, 1995

This case deals with a referral pursuant to section 65 of the Canada Labour Code. In a previous decision, the Board dealt with the constitutional aspect of this application without making a final determination, as certain factual elements were then missing.

The Board has since received additional information on the longshoring activities of Équipements Bellemare, which confirms that the company did perform loading duties during or following the Board hearing held in May 1994. In addition, the company confirmed that it has not carried out any longshoring activities in 1995, and that it has no intention of doing so in the future.

This leaves one question to determine: at the relevant time, was the company established to perform the contract to deliver cement for Ciment St-Laurent a company engaged in longshoring in the port of Trois-Rivières/Bécancour?

The Board notes that Équipements Bellemare's foray into longshoring was strictly ad hoc and

Résumé

Syndicat des débardeurs de Trois-Rivières, section locale 1375 (SCFP), *requérant*, et Association des employeurs maritimes et Équipements Bellemare Ltée, *intimées*.

Dossier du Conseil: 610-130
CCRT/CLRB Décision n° 1142
le 13 octobre 1995

La présente décision traite d'un renvoi fondé sur l'article 65 du Code canadien du travail. Dans une décision antérieure, le Conseil a traité de l'aspect constitutionnel de cette demande sans se prononcer de façon définitive, certains éléments factuels n'étant pas alors à la connaissance du Conseil.

Le Conseil a reçu depuis des renseignements complémentaires sur les activités de débardage d'Équipements Bellemare, lesquels confirment que cette entreprise a effectué des chargements pendant ou après l'audience du Conseil tenue en mai 1994. D'ailleurs, l'entreprise confirme qu'elle a cessé toute activité de débardage en 1995 et qu'elle n'a plus l'intention de s'y livrer.

Il ne reste qu'une question à trancher: au cours de la période pertinente, l'entreprise mise sur pied pour exécuter le contrat de livraison de ciment pour le compte de Ciment St-Laurent était-elle une entreprise oeuvrant dans le secteur du débardage dans la région portuaire de Trois-Rivières/Bécancour?

Le Conseil prend acte du fait que l'incursion d'Équipements Bellemare dans le secteur du

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that the company clearly chose to remain an intraprovincial transportation undertaking. However, it does not consider the information to be relevant or useful with respect to the question submitted in this case. The fact that the company carried out these activities during and following the hearing clearly attests to the company's wish to maintain the longshoring undertaking. That the company decided to cease these activities certainly puts an end to this undertaking, but does not change the company's willingness to perform longshoring activities at the time.

For these reasons, the Board allows the first two findings sought by the applicant. It declares that Équipements Bellemare is bound by the certification issued to Local 375 of the Canadian Union of Public Employees (CUPE), in the geographic region of the port of Trois-Rivières and Bécancour, and by the collective agreement entered into by the Maritime Employers' Association and CUPE.

As regards the last two findings sought, i.e. to declare that the so-called longshoring activities carried out by Équipements Bellemare are covered by the collective agreement, and to order the company to use the personnel covered by the union's certification, the Board considers that it will be up to the arbitrator seized with the grievances to deal with these matters.

débardage n'a été que ponctuelle et que l'entreprise a clairement choisi de demeurer une entreprise de transport intraprovincial. Il n'estime pas pour autant l'information pertinente ou utile à l'égard de la question qui lui a été soumise dans le cadre de la présente affaire. Le fait que l'entreprise a poursuivi de ces activités pendant et après l'audience atteste clairement de la volonté d'Équipements Bellemare de maintenir son entreprise de débardage. Qu'elle ait décidé de se retirer de ce secteur d'activité met certainement fin à cette vocation, mais ne change en rien la confirmation de l'entreprise à l'égard des activités de débardage pour la période en cause.

Pour ces raisons, le Conseil accueille donc les deux premières conclusions recherchées par le requérant. Il déclare qu'Équipements Bellemare est liée par l'accréditation accordée à la section locale 375 du Syndicat canadien de la Fonction publique (SCFP), dans la région géographique constituée des ports de Trois-Rivières et de Bécancour, et par la convention collective intervenue entre l'Association des employeurs maritimes et le SCFP.

Pour ce qui est des deux dernières conclusions recherchées, c'est-à-dire déclarer que les activités dites de débardage et effectuées par Équipements Bellemare sont régies par la convention collective et d'ordonner que cette compagnie doit utiliser le personnel visé par l'accréditation détenue par le syndicat, le Conseil estime qu'il reviendra à l'arbitre saisi des griefs de déterminer ces questions.

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Reasons for decision

Syndicat des débardeurs de Trois-Rivières,
Local 1375 (CUPE),

applicant,

and

Maritime Employers' Association and
Équipements Bellemare Ltée,

respondents.

Board File: 610-130
CCRT/CCRT Decision no. 1142
October 13, 1995

The Board was composed of Ms. Louise Doyon, Vice-Chair, as well as Mr. François Bastien and Ms. Sarah E. FitzGerald, Members.

Counsel of record

Mr. Claude Hétu, union advisor, accompanied by Mr. Fernand Cléricy, union advisor, for the union;

Mr. John Coleman and Mr. Malcolm MacLeod, labour relations officer, for the Maritime Employers' Association; and

Mr. Rolland Forget and Mr. Claude Pellerin, manager, Transport Division, for Équipements Bellemare Ltée.

These reasons for decision were written by Mr. François Bastien, Member.

This decision deals with the final disposition of an application for referral filed pursuant to section 65 of the Canada Labour Code. In Équipements Bellemare Ltée (1995), 97 di 84 (CLRB no. 1112), the Board dealt at length with the constitutional aspect of the application without making a final determination, as certain factual elements were missing. The Board has since received this information in writing and is now in a position to make a final determination.

I

After having analyzed the constitutional question raised with respect to the activities of Équipements Bellemare Ltée (the respondent), the Board found that these activities were clearly longshoring activities and that they had been carried out within an operational framework established expressly to ensure that everything went smoothly. The Board also concluded that, in the circumstances, the respondent was a federal undertaking for it carried out longshoring activities, even though the ongoing nature of this business remained somewhat unclear insofar as its intention to engage, or continue to engage, in longshoring work was concerned.

For this reason, the Board refrained from declaring that the longshoring part of Équipements Bellemare was bound by the geographic certification and by the collective agreement in effect in the geographic area of the port of Trois-Rivières/Bécancour without first obtaining information on the company's longshoring activities subsequent to the hearing. The Board had the following to say in this regard:

"... the Board believes it must determine the precise nature of its involvement in this regulated industry. That was the approach it adopted in Halifax Grain Elevator Limited, supra, where, after identifying its activities in the Port of Halifax as longshoring, it did not issue an order allowing the employer involved to withdraw from this industry if it so desired. In our opinion, the present case calls for a similar approach. Either, because it carried out longshoring activities as they were described earlier, or because it plans to do so with a view to performing new loading contracts, Bellemare will continue to engage in longshoring in the designated port area; or decide that, after performing the loading contract at issue here, it no longer intends to carry out this activity. In the first case, Bellemare will become subject to the statutory labour relations system in force in the designated port area; in the latter case, the system will not apply because it chooses to remain a purely intraprovincial specialized transportation business.

For this reason, the Board makes no final determination in the present case. The information on which it could base this final

determination is, insofar as its exists, known only to the parties. Should the parties (or one of them) decide that they should bring this information to the Board's attention, they will have 15 days to do so. ..."

(Équipements Bellemare Ltée, supra, pages 100-101)

Following this interim decision within the meaning of section 20(1) of the Code, the Board received from the applicant, on April 13, 1995, additional information concerning the respondent's longshoring activities, information which the respondent confirmed in its detailed reply dated May 1, 1995. If we exclude from the table submitted by the applicant the five shipments of cement loaded between May and October 1993, evidence of which is already before the Board, the table shows the following shipments loaded concurrently with, or subsequent to, the Board's hearing in May 1994:

Date	Ship	Tonnage
May 7, 1994	Flag Adrienne	12 500,51 t
July 3, 1994	Flag Adrienne	13 049,08 t
July 22, 1994	Flag Adrienne	13 100,10 t

(table found on page 2 of the union's letter dated April 10, 1995 - document no. 49075)

In his reply dated May 1, 1995, counsel for the employer argued that the Board was aware of most shipments shown in the table prepared by the union when the hearing took place, and that there had not been, nor would there be in 1995, in the port of Trois-Rivières/Bécancour, any loading of the type of cement involved in the present

case. He also indicated that Équipements Bellemare would not be doing any work for St. Lawrence Cement. Finally, he produced a letter from Louis Le Sage, financial comptroller of Équipements Bellemare, stating that the company had no intention in the future of engaging in the type of longshoring work that was the subject of the Board's decision.

II

The evidence clearly revealed that Équipements Bellemare continued its longshoring activities after the union's application was filed and following the Board's hearing in this case. The question that remains to be determined, therefore, is whether, in continuing these activities, this business met the requirements of the definition of going concern as it relates to the notion of intent as underlined by the Board in its interim decision.

The respondent argued that Équipements Bellemare's foray into longshoring, if any, was strictly ad hoc and that the company clearly chose to remain a provincial transportation business. While the Board takes note of this commitment, it does not, however, consider the information relevant or useful in dealing with the question submitted in the present case. The Board has to determine in fact whether at the time this application was filed or, at the very least, at the time of the hearing, the part of the business that was said to be engaging in longshoring met the requirements of a going concern, i.e., in this case clearly showed an intention to pursue longshoring activities.


The uncontested fact that the company continued to carry out longshoring work is clear evidence of its intent to maintain this business. That it has since decided to cease these activities certainly puts an end to this facet of the business, but in no way affects the company's intent with respect to the longshoring activities at issue here.

This means that for the relevant period, the business established by Équipements Bellemare to perform the cement delivery contract on behalf of St. Lawrence Cement was, for the purposes of the constitutional question, a business involved in longshoring in the geographic area of the port of Trois-Rivières/Bécancour.

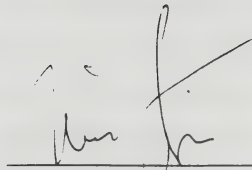
For these reasons, the Board allows the first two findings sought by the applicant union, namely, (a) that Équipements Bellemare is bound by the certification issued to the Canadian Union of Public Employees, CUPE Local 1375, in the geographic area of the ports of Trois-Rivières and Bécancour and (b) that it is also bound by the collective agreement entered into by the Maritime Employers' Association (MEA) and CUPE.

As the Board noted in its earlier decision, the last two findings sought by the applicant deal with the practical effects of the first two findings. In fact, the Board is asked to declare that the activities of Équipements Bellemare found to constitute longshoring are governed by the terms of the collective agreement and to order Équipements Bellemare to use the services of the employees covered by the union's certification. These findings raise the question of the Board's jurisdiction to deal with them insofar as they involve the interpretation of the collective agreement, as counsel for the respondent and the MEA pointed out. Having determined pursuant to section 65 that while performing longshoring work, the company was bound by the union's geographic certification and by the collective agreement entered into with the union and the MEA, the Board considers that the arbitrator will have to determine the questions raised with respect to the last two findings sought by the applicant.

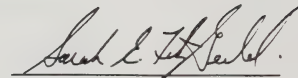
This is a unanimous decision of the Board.



Louise Doyon
Vice-Chair



François Bastien
Member



Sarah E. FitzGerald
Member

information

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Summary

Elbon Harris, *applicant*, and Canadian
National Railway Company, *employer*.

Board File: 950-318
CLRB/CCRT Decision no. 1143
October 25, 1995

Résumé

Elbon Harris, *requérant*, et Compagnie des
chemins de fer nationaux du Canada,
employeur.

Dossier du Conseil: 950-318
CLRB/CCRT Décision n° 1143
le 25 octobre 1995

These reasons deal with the referral of a
safety officer's decision to the Board under
section 129(5) of the Canada Labour Code.

A preliminary matter pertaining to timeliness
arose. The safety officer advised the applicant
that his referral request was beyond the time
limits contained in section 129(5) of the Code.
Nevertheless, the safety officer referred the
matter to the Board.

The Board examined the timeliness issue
because this matter goes to its ability to
assume jurisdiction to conduct an inquiry in
accordance with section 130(1) of the Code.
Only if a referral is found to be timely does
the Board have jurisdiction to consider the
merits of a referral.

The Board requested written submissions from
the parties on the timeliness issue. The written
submissions from the parties did not
adequately address this issue. The Board then
convened an inquiry into the matter.

Les présents motifs portent sur le renvoi au
Conseil d'une décision d'un agent de sécurité
aux termes du paragraphe 129(5) du Code
canadien du travail.

Une question préliminaire concernant les
délais a été soulevée. L'agent de sécurité a
informé le requérant que sa demande de
renvoi n'avait pas été présentée dans les délais
prévus au paragraphe 129(5) du Code. Quoi
qu'il en soit, l'agent de sécurité a renvoyé
l'affaire au Conseil.

Le Conseil a examiné la question du respect
des délais parce que l'affaire porte sur sa
capacité de s'arroger l'autorité pour mener
une enquête aux termes du paragraphe 130(1)
du Code. Il ne peut étudier le bien-fondé d'un
renvoi que s'il juge que la demande de renvoi
a été présentée dans les délais prescrits.

Le Conseil a demandé aux parties de lui
soumettre des observations écrites concernant
la question du respect des délais. Ces
observations ne traitaient pas adéquatement de
la question. Le Conseil a donc mené une
enquête dans la présente affaire.

Canada
Labour
Relations
Board
Conseil
canadien des
relations du
travail



Under section 129(5), notice of referral must be given in writing within seven days of receiving the safety officer's written decision. The time limits to refer a safety officer's decision to the Board are very strict. Considering what the Supreme Court of Canada said about the Board's powers in relation to time limits, there is no discretion in the Code for the Board to extend the time limits contained in section 129(5).

Since the applicant failed to observe the time limits contained in section 129(5), the Board does not have jurisdiction to continue its inquiry into the substantive matter of the referral.

Aux termes du paragraphe 129(5), il faut donner un avis écrit dans les sept jours de la réception de la décision écrite de l'agent de sécurité. Le délai prévu pour renvoyer une décision d'un agent de sécurité est impératif. Compte tenu de ce que la Cour suprême du Canada a dit au sujet des pouvoirs du Conseil en matière de délais, le Code ne confère au Conseil aucun pouvoir discrétionnaire pour proroger les délais prévus au paragraphe 129(5).

Étant donné que le requérant n'a pas respecté les délais prévus au paragraphe 129(5), le Conseil n'a pas compétence pour poursuivre son enquête concernant la question du renvoi.

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Reasons for decision

Elbon Harris,

applicant,

and

Canadian National Railway Company,

employer.

Board File: 950-318

CLRB/CCRT Decision no. 1143

October 25, 1995

The Board was composed of Ms. Mary Rozenberg, Member, pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Health and Safety).

This matter was referred to the Board on June 26, 1995 by the Safety Officer following a request in writing dated June 5, 1995 from Mr. Elbon Harris. The Board convened an inquiry into the matter on September 26, 1995 in Toronto.

Appearances

Mr. Elbon Harris, Hostler, assisted by Mr. Lofty McDowell, CAW Union Representative, and Mr. Mike Schiavone, Co-Chair Health and Safety, Willowbrook Station, for the applicant;

Ms. Cathie Del Vecchio, Safety Officer at Human Resources Development Canada, accompanied by Mr. Bob Tomlin, Acting Manager, Human Resources Development Canada, Labour Program, Toronto East, for the Safety Officer;

Mr. Kenneth R. Peel, Counsel, Canadian National, Ontario, accompanied by Mr. John McPherson, Supervisor, Health and Safety, CN Willowbrook, Mr. Brian G. Whately, Supervisor, Technical Projects - Training (Mechanical), CN Willowbrook, and Mr. Frank O'Neill, Labour Relations Officer, Eastern Canada, for the employer.

These reasons for decision were written by Ms. Mary Rozenberg, Member.

Prior to the hearing, the Board requested the parties to comment on the issue of timeliness. After having received the parties' submissions, the Board scheduled and convened an inquiry into the matter because the written submissions received from the parties did not adequately address this issue. Further, the Board decided to give Mr. Harris, who was not represented by Counsel, an opportunity to make his submissions on the timeliness issue.

At the commencement of the Board's inquiry under section 130(1), the Board examined the timeliness issue as it goes to the jurisdiction of the Board to conduct an inquiry.

The Safety Officer advised the Board that Human Resources Development Canada (formerly Labour Canada) usually sends all referrals to the Board even if the request is made outside the seven-day time limit. This practice is contained in their operating procedures and directives.

Submissions

Applicant's Submissions

Mr. Harris told the Board that he was expecting to receive a form with which to register his request for referral. When he received the safety officer's report, he telephoned the Human Resources Development Canada, Labour Programme office on May 26, 1995 and spoke to a lady about "the form." He told the Board that the lady advised him to put his appeal in writing and to submit it within 14 days. Mr. Harris did not know the identity of the lady on the phone. He informed Mr. Mike Schiavone, the Health and Safety Co-Chair, that he was advised that he had 14 days to appeal the safety officer's decision.

Mr. Schiavone submitted that he was familiar with sections 128 and 129 because he has had some health and safety training. Mr. Harris however, he submitted, has had no such training and is only aware of his right to refuse to work because he received a card from the President of the CAW Local which outlines the steps to follow when refusing to perform dangerous work.

Mr. Schiavone, advised the Board that he also believed that a form would be sent to Mr. Harris to allow him to request a referral and he suggested Mr. Harris call Labour Canada for the form. Mr. Schiavone said that he read the May 16, 1995 safety officer report on Thursday, May 25, 1995 and was aware that the report mentioned a 7-day time limit to request a referral and that he also told this to Mr. Harris after Mr. Harris said that he had 14 days to file an appeal. Furthermore, he told Mr. Harris that he was not aware of the 14-day time limit, but knew of the 7-day time limit from his own experience in safety referrals.

Mr. Schiavone submitted that when Mr. Harris made the phone call on May 26, 1995 to enquire about the form, the Human Resources Development Canada, Labour Programme office knew that he wanted to request referral of the safety officer's decision and that this call constituted a notice of appeal.

Safety Officer's Submissions

Safety Officer Del Vecchio submitted that she usually advises the parties at the beginning of an investigation of their rights under Part II of the Canada Labour Code. She also advises them of the referral process under Part II of the Code at the end of an investigation. She also said that she knows that there is no form to file a request for referral. She did inform the parties that she writes a report which she sends to the parties and that the request for referral must be filed within seven days from the receipt of that report.

Safety Officer Del Vecchio advised the Board that the lady on the phone would have been a duty officer because all safety officers alternate days as duty officers. On May 26, 1995, the duty officer was Helayne Hauw who has been a safety officer with Human Resources Canada and the former Labour Canada for 12 years. She is a senior safety officer experienced in safety investigations and reports and she must refer to the operating procedures and directives, if in doubt. Safety Officer Del Vecchio investigated Mr. Harris' submissions and spoke to the May 26 duty officer. Although the duty officer could not recall the specifics of the conversation with Mr. Harris, she had filled out a Government of Canada action request. The action request contains the following information: the timing of Mr. Harris' telephone call (May 26, at 8:30), and certain comments "(Cathie Del Vecchio's Assign. wanted to know how to appeal. (Safety Officer) RW decision! Spoke to him already & advised. FYI)."

Employer's Submissions

The employer submitted that at the time of the work refusal, an employer representative asked Mr. Harris and Mr. Schiavone if they were familiar with section 128, to which they answered yes. The parties were also counselled by the safety officer on the procedures and processes under Part II of the Code at the beginning and at the end of her investigation. These procedures and processes were contained in the May 16, 1995 investigation report which Mr. Harris received on May 24, 1995.

When Mr. Harris called the safety officer, he wanted to find out about the form, not about the time limits. The investigating safety officer made enquiries into the telephone conversation of May 26, 1995. The duty officer on that day was a safety officer with 12 years experience in safety matters which include investigations into work refusals. For the duty officer to advise Mr. Harris or anyone else that he or she can appeal a safety officer's decision within 14 days would be different from the training, directives and experience received as a safety officer with Labour Canada.

Decision

Following submissions from the parties the Board made the following oral ruling:

"After having carefully reviewed the documents, evidence and submissions of the parties, the letter dated June 5, 1995 does not meet the requirements of section 129(5) and is therefore not a valid referral. The Code does not give either the Board nor the Safety Officer any authority to extend the time limits contained in section 129(5). As a result, the Board does not have jurisdiction to inquire further into this matter. Therefore the matter is dismissed. This will be confirmed in writing with reasons to follow."

The Board must first address the timeliness issue because it goes to the Board's ability to assume jurisdiction to conduct an inquiry in accordance with section 130(1) of the Code into the matter. Only if a referral is found to be timely, does the Board have jurisdiction to consider the merits of a referral.

The timeliness of a request for referral of safety officer's decisions is governed by section 129(5) of the Code which reads as follows:

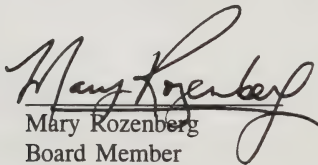
"129. (5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."

(emphasis added)

The time limits contained in the Code to refer a safety officer's decision to the Board are very strict. The safety officer must refer his or her decision to the Board when an

employee gives notice in writing within seven days of receiving notice of his or her decision. The Board cannot extend the time limits contained in the Code. The Supreme Court of Canada has dealt with the timeliness issue in Upper Lakes Shipping Ltd. v. Mike Sheehan et al., [1979] 1 S.C.R. 902. The Board has also commented on this issue in Rosario Coulombe (1989), 78 di 52 (CLRB no. 747); and Donald J. Jollimore (1982), 48 di 63 (CLRB no. 368). There is nothing in the Code that allows or authorizes the Board to extend the time limits contained in section 129(5).

Mr. Harris received the safety officer's written report on May 24, 1995. Under section 129(5), notice must be given in writing within seven days of receiving the report. Mr. Harris filed his request in writing to refer the safety officer's decision to the Board on June 5, 1995. Therefore, Mr. Harris failed to observe the time limits contained in section 129(5). There is no discretion in the Code for the Board to extend these time limits. Accordingly, the Board does not have jurisdiction to enquire into the merits of the referral. The application is accordingly dismissed.


Mary Rozenberg
Board Member

